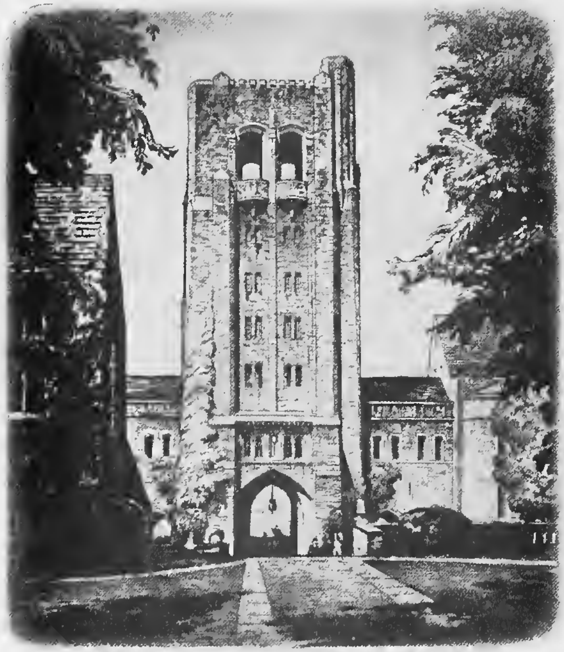

OUTLINE

OF THE

LAW OF TRUSTS

PREPARED FOR THE USE OF STUDENTS
IN THE BROOKLYN LAW SCHOOL
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BY

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NOTE.

This outline is designed for the use of the students of the Brooklyn Law School. It is intended to serve mainly as a guide to the reading of cases, and is in no sense a treatise on the subject. It lacks both the fullness of treatment and original research necessary to such a work. It follows to a considerable extent the lines of two works, Ames' Cases on Trusts and Reeves on Real Property, from both of which many valuable suggestions and ideas have been drawn. In Article III. the plan of the former work has been adopted, and in Articles VIII., IX. and X. it has been followed very closely, the heads and sub-heads having been quoted therefrom as indicated. I am also indebted to the same work for many of the cases cited. Reeves on Real Property has been largely followed in the discussion of express trusts for special purposes, and constructive trusts. Much assistance has also been received from Perry on Trusts, Lewin on Trusts, and the American and English Encyclopedia of Law.

The use made of the works of Professor Ames and Professor Reeves, as above stated, has been by their permission, and my thanks are hereby extended for the help thus afforded.

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I.

ORIGIN AND HISTORY OF TRUSTS.

Modern trusts are for the most part an outgrowth of the practice of enfeoffing to uses which prevailed in England in mediæval times.

Uses. The use was defined by Lord Coke as follows:

> "An use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet,* that *cesty que use* shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cesty que use* had neither *jus in re,* nor *jus ad rem,* but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedy was only by subpœna in Chancery." (2 Coke upon Littleton, by J. H. Thomas, Chap. XLIII, *570.)

For a history of the origin and development of uses in England, see:

Digby's History of the Law of Real Property, Ch. VI., pp. 315-343.
Reeves on Real Property, Secs. 294-301.
1 Perry on Trusts, Secs. 1-4.
1 Lewin on Trusts, *1-6.
2 Coke upon Littleton, by Thomas, *570, Note A.
Burgess v. Wheat, 1 Eden, 177, 217-227.

Writers are divided as to whether the *fidei commissa* of the Roman law played any part in the development or enforcement of the use. See, Digby's History of the Law of Real Property, Perry on Trusts, and Lewin on Trusts, *supra,* also

Bispham's Principles of Equity, Sec. 50.
McDonough's Exrs. v. Murdoch, 15 How. (U. S.), 367.

The use was not recognized by the common law courts, but only in Chancery.

> Anon., Y. B., 4 Edw. IV., fol. 7, pl. 9; Ames' Cases on Trusts, 240.
>
> Anon., Y. B., 15 Hy. VII., fol. 13, pl. 1; Id., 251.

If the feoffee to uses enfeoffed another, no subpœna could at first be had against the second feoffee, but this was later confined to those who took for value and without notice.

> *Note*. Fitzherbert's Abgt., tit. Subpœna, pl. 19; Ames' Cases on Trusts, 282, and note.
>
> Anon., Y. B., 14 Hy. VIII., fol. 4, pl. 5; Id., 283.
>
> *Note*. Brooke's New Cases, March's Translation, 95; Id., 285, and note.

So also no subpœna could at first be had against the heir of the feoffee to uses, but this was afterward reformed.

> Anon., Y. B., 8 Edw. IV., fol. 6, pl. 1; Ames' Cases on Trusts, 345, and note.
>
> Weston v. Danvers, Tothill, 105; Id., 346, and note.

No subpœna could be had against a disseisor nor against a tenant in dower or by the curtesy of the feoffee to uses.

> Lord Compton's Case, 3 Leonard, 196; Ames' Cases on Trusts, 370.
>
> Earl of Worcester v. Finch, 4 Inst., 85; Id., 370.
>
> Nash v. Preston, 3 Croke, 190.
>
> Ames' Cases on Trusts, 373, 374, Notes, "Uses."

The interest of the *cestui que use* descended to his heirs in like manner as a legal estate.

> Anon., Y. B., 5 Edw. IV., fol. 7, pl. 16; Ames' Cases on Trusts, 351, and notes.

Such interest was alienable by the *cestui que use*.

The duties of the feoffee to uses were generally to permit the *cestui que use* to take the profits, to make an estate as

directed by him, and to re-enter or bring a proper action to recover possession in case he (the feoffee) should be disseised.

Coke upon Littleton, *supra.*

The feoffee might, however, have active duties to perform; for an instance see Case in the Reign of Henry VII., 2 Sugden on Powers, Appendix 1, *510.

Uses might be created in both real and personal property.

Lewin on Trusts, *4.

The Statute of Uses. The purpose of this statute (27 Hy. VIII., Ch. 10) was to put an end to the practice of enfeoffing to uses, and the enforcement thereof, by vesting the legal title in the *cestui que use.*

Digby's History of the Law of Real Property, Ch. VII., pp. 344-354.

Reeves on Real Property, Sec. 302.

Construction of the Statute. As the statute was construed by the common law judges it was practically rendered nugatory, so far as its purpose of abolishing uses was concerned. It was held that where one use was created upon another, as where A enfeoffed B, to the use of C, to the use of D, the legal title was vested in C, and the statute did not execute the second use.

Reeves on Real Property, Sec. 303.

Tyrrel's Case, Dyer, 155a; Digby's History of the Law of Real Property, 375.

Girland v. Sharp, Cro. Eliz., 382; Id., 375.

Chancery after a time seized hold of this second use and began to enforce it under the name of a trust.

Lady Whetstone v. Sts. Bury, 2 P. Wms., 146.

Hopkins v. Hopkins, 1 Atk., 581.

Active uses were held not to be executed by the statute, and were enforced in Chancery.

Nevill v. Saunders, 1 Vern., 415; Digby's History of the Law of Real Property, 376.

Uses in personalty including leaseholds were held not to be executed, and were enforced in Chancery.

1 Perry on Trusts, Sec. 6.
1 Lewin on Trusts, *6.

Development of Trusts. Thus modern trusts were developed by Chancery from the uses held not to be executed by the Statute of Uses. For a history of this development, see:

Digby's History of the Law of Real Property, pp. 368-374.
Reeves on Real Property, Sec. 304.
1 Perry on Trusts, Secs. 5-12.
1 Lewin on Trusts, *6-12.
2 Coke upon Littleton, by Thomas, *590, Note C.

Trusts Recognized by Common Law. There is a certain class of trusts which were not developed by Chancery from uses, but have been enforced from early times by common law courts in the action of account, and sometimes where the amount was fixed in the action of debt. Such trusts may be described as trusts arising in general out of business transactions and relations. Early examples of such trusts and their enforcement will be found in the following cases:—

Anon., Y. B., 6 Hy. IV., fol. 7, pl. 33; Ames' Cases on Trusts, 1, and notes.
Paschall v. Keterich, Dyer, 151b, pl. 5; Id., 2, and notes.
Harris v. deBervoir, Cro. Jac., 687; Id., 4.
Farrington v. Lee, 2 Mod. Rep., 311; Id., 6, and notes.

Trusts of this character will now also be enforced in equity.

Ames' Cases on Trusts, p. 1, Note 3.

II.

DEFINITION.

Lord Coke's definition of a use (*supra*) has sometimes been adopted as the definition of a trust.

Perry on Trusts, Secs. 13-17.

A definition more in accord with modern ideas would seem to be as follows:

A trust exists where the legal title to property is vested in one person, but he is under a legal duty (as distinguished from a mere moral obligation), to apply or dispose of that property or some part thereof or some interest therein in some way for the benefit of some other person or persons. From this must be excepted certain legal (as distinguished from equitable) relationships, which are of a strictly fiduciary character, but which are not classed as trusts because of their different historical development. Such are executorships, administratorships, guardianships, committeeships, receiverships, etc.

The modern idea of a trust seems incapable of more precise definition.

III.

TRUSTS DISTINGUISHED FROM OTHER LEGAL RELATIONS.

A. Trust and Debt Distinguished.

The distinction between a trust and a debt is that the trustee is liable to restore or account for some specific property or fund, while a debtor is liable to pay out of his general property. The question arises most often in cases where the subject of an alleged trust is a sum of money, and the alleged trustee is insolvent. If there is a trust, and it is shown that an insolvent debtor is in possession of the fund, the trust creditor is entitled to preferential payment. If, on the contrary, there is merely a debt, the creditor can have only his *pro rata* share. The question may also arise where an alleged trust fund is in the form of a debt due from a third person to the alleged trustee, and the alleged trustee is indebted at the same time to the third person. If there is a trust, such debts cannot be set off one against the other. This topic may be divided into four heads:

1. Where money is paid to one for the use of another.
2. Where money is paid or property transferred by one to another for a specific purpose.
3. Appropriation.
4. Under Bankruptcy Acts.

1. Money Paid to One for the Use of Another.

Agents. Money collected for premiums by the general agent of an insurance company constitutes a trust fund.

National Bank v. Insurance Co., 104 U. S., 54.

So do moneys received by factors from the sale of principal's goods.

Union Stock Yards Bank v. Gillespie, 137 U. S., 411.

Wallace v. Castle, 14 Hun, 106; Ames' Cases on Trusts, 25.

So in case of an agent for the sale of uncurrent funds.

Johnson v. Whitman, 10 Abb. Pr., (N. S.), 111.

Bank Collecting Commercial Paper. Where commercial paper is sent to a bank for collection, the collecting bank is a trustee thereof for the owner until collection, and if its duty is to collect and remit at once it continues as trustee of the fund after collection.

Continental National Bank v. Weems, 69 Tex., 489.

People v. Bank of Dansville, 39 Hun, 187.

Arnot v. Bingham, 55 Hun, 533, (but see, Frank v. Bingham, 58 Hun, 580).

People v. Merchants' Bank of Binghamton, 92 Hun, 159.

Freiberg v. Stoddard, 161 Pa. St., 259.

McLeod v. Evans, 66 Wis., 401.

Overruled on other grounds, Nonotuck Silk Co. v. Flanders, 87 Wis., 237.

Thompson v. Gloucester City Savings Instn., 8 At. Rep., 97.

Where, however, there is any arrangement, either express, or implied from custom or course of dealing, whereby the collecting bank is entitled to retain the sum collected and use it as its own until the time for remittance comes—be the interval ever so short—the trust relationship ceases as soon as the money comes into the hands of the collecting bank, and the relationship of debtor and creditor takes its place.

People v. City Bank of Rochester, 93 N. Y., 582.

Marine Bank v. Fulton Bank, 2 Wall., 252.

Phil. Nat'l Bank v. Dowd, 2 L. R. Ann., 480, 486.

But see:

Planters' Bank v. Union Bank, 16 Wall., at p. 501.

Where the agent bank sends the paper to a sub-agent bank for collection, the proceeds remain trust funds until actually paid to the agent bank, or applied to payment of

its indebtedness to such sub-agent, even though the agent bank has the right to retain and use the proceeds until a day of remittance.

> Commercial National Bank v. Armstrong, 148 U. S., 50.
>
> National Butchers' and Drovers' Bank v. Hubbell, 117 N. Y., 384.
>
> Manufacturers' Bank v. Continental Bank, 148 Mass., 553.

If the paper is endorsed for collection, or notice is otherwise given to the sub-agent bank that it is not the property of the agent bank, the sub-agent cannot retain the proceeds on account of any claim it has against the agent.

> Comm. Nat. Bank v. Hamilton Nat. Bank, 42 Fed. Rep., 880; Ames' Cases on Trusts, 15.
>
> Bank of Clark Co. v. Gilman, 81 Hun, 486.
>
> Bank of Sherman v. Weiss, 67 Tex., 331.

Where, however, the sub-agent bank has no notice but that the paper is the property of its immediate correspondent, it may apply the proceeds to the payment of even an antecedent debt due from the agent bank.

> Bank of Metropolis v. N. E. Bank, 1 How. (U. S.), 234; 6 Id., 212.

But not in jurisdictions where an antecedent debt is not such consideration as will make the transferee of commercial paper a *bona fide* holder.

> McBride v. Farmers' Bank, 26 N. Y., 450.
>
> Dickerson v. Wason, 47 N. Y., 439.
>
> Scott v. Ocean Bank, 23 N. Y., 289.

Where commercial paper is sent to an agent bank for collection, which sends it to a sub-agent bank, which collects it and fails before remitting, the agent is nevertheless liable to the owner for the amount, which is apparently holding the agent bank a debtor and seems to be in con-

flict with the theory of the cases which have held the money in the hands of a sub-agent still a trust fund.

Briggs v. Central National Bank, 89 N. Y., 182.
Mackersy v. Ramsays, Bonars & Co., 9 Cl. & F., 818; Ames' Cases on Trusts, 13, and notes.

But see:

Indig v. National City Bank, 80 N. Y., 100, 105.

Where a check was sent to the bank on which it was drawn, charged to the drawer's account, and surrendered, but the bank failed before the draft by which remittance had been attempted was paid, it was held that the relation was that of debtor and creditor.

People v. M. & M. Bank of Troy, 78 N. Y., 269.

2. Money Paid or Property Transferred by One to Another for a Specific Purpose.

To Take up Negotiable Paper. Some authorities hold it to be a debt.

Ex parte Broad, 13 Q. B. D., 740; Ames' Cases on Trusts, 19.

In re Barned's Banking Co., 39 L. J. Ch., 635; Id., 42.

Contra,

People v. City Bank of Rochester, 96 N. Y., 32.
Peak v. Ellicott, 30 Kan., 156.

To Pay Debts. Where property was transferred by A to B, B promising to pay A's debt (which was a trust debt) to C, no trust attached to the property.

Steele v. Clark, 77 Ill., 471; Ames Cases on Trusts, 44.

For Investment. Money placed in the hands of another for investment is usually a trust fund.

Merino v. Munoz, 5 App. Div., 71.
Harrison v. Smith, 83 Mo., 210.

But see:

Pittsburgh Nat. Bank of Comm. v. McMurray, 98 Pa., 538; Ames' Cases on Trusts, 30.

To Secure Advances. Money deposited for such purpose is a debt.

Butler v. Sprague, 66 N. Y., 392.

Effect of Agreement to Pay Interest. Such an agreement usually constitutes the depositee a debtor.

Ex parte Broad, *supra.*

Pittsburgh Nat. Bank of Comm. v. McMurray, *supra.*

Butler v. Sprague, *supra.*

3. Appropriation.

Where an attempt is made by the depositee to appropriate a fund placed in his hands to the purpose intended, and it has been separated from his other funds, it constitutes a trust fund, even though otherwise it would have been a debt.

Farley v. Turner, 26 L. J., Ch., 710; Ames' Cases on Trusts, 40.

In re Barned's Banking Co., *supra.*

And one may even appropriate his own moneys to the use of another, so as to constitute himself a trustee.

Hamer v. Sidway, 124 N. Y., 538; Ames' Cases on Trusts, 33.

Matter of Le Blanc, 14 Hun, 8.

4. Under Bankruptcy Acts.

Relations otherwise fiduciary may not be so under bankruptcy acts, as in the case of a factor or one holding securities to secure acceptances.

Chapman v. Forsyth, 2 How. (U. S.), 202, 208.

Hennequin v. Clews, 111 U. S., 676.

B. Trust and Bailment Distinguished.

The only occasions to distinguish between a trust and a bailment arise, of course, in cases of trusts of personal property. The obligation of the bailee is to return the subject of the bailment in specie, that is *the identical articles or material,* though it may be in an altered form. The

obligation of a trustee on the other hand is not to render the identical property which comes into his hands, but to account for the same. He may entirely change its character, may sell it, or invest it in various ways, but at the termination of the trust he must account for all he has received. In bailment the legal title to the bailed property remains in the bailor, the bailee having only the right of possession. In a trust the legal title is in the trustee, as well as usually the right of possession.

Anon., Y. B., 12 & 13 Edw. III., 244; Ames' Cases on Trusts, 52.

Ashley v. Denton, 1 Litt. (Ky.), 86; Id. 52.

Sturtevant v. Orser, 24 N. Y., 538.

Brown v. Bowe, 35 Hun, 488.

C. Trust and Charge Distinguished.

A charge exists where an obligation is imposed upon a person to whom property is given to make a payment to another person as a condition of accepting the same: as where A gives land to B upon condition that B shall pay C a definite sum or an annuity. The obligation is, in general, primarily the personal obligation of B, and the property is merely security in equity for its performance. Subject to making the payment the property belongs absolutely to B.

Hodge v. Churchward, 16 Sim., 71; Ames' Cases on Trusts, 55.

Jacquet v. Jacquet, 27 Beav., 332; Id., 56.

Loder v. Hatfield, 71 N. Y., 92, 97, 102-4.

Robb v. Washington and Jefferson College, 103 App. Div., 327, 357.

19 Am. & Eng. Encyc. of Law, 2nd Ed., 1342, 1365.

D. Trust and Executorship Distinguished.

A trust differs from an executorship, mainly in the nature of the duties to be performed. An executorship is in its nature a trust, but the duties are limited to closing up the estate of the testator; *i. e.*, collecting assets, paying debts and expenses, and distributing the residue. If addi-

tional duties are imposed on executors they are to that extent trustees. They will not, however, be entitled to double compensation unless their duties as executors and trustees are severable under the will and to be successively performed and further unless they have at least substantially concluded their duties as executors and actually entered upon the performance of their duties as trustees.

Scott v. Jones, 4 Clk. & F., 382; Ames' Cases on Trusts, 70.
In re Smith, 42 Ch. D., 302; Id., 72.
Drake v. Price, 5 N. Y., 430; Id., 74.
Hurlburt v. Durant, 88 N. Y., 121.
Johnson v. Lawrence, 95 N. Y., 154.
McAlpine v. Potter, 126 N. Y., 285, 289-90.
Everson v. Pitney, 40 N. J. Eq., 539.

E. Trust and Assignment of Chose in Action Distinguished.

This distinction is important only in jurisdictions where the assignment of a chose in action does not carry the legal title, but the assignee must sue in the name of the assignor. The assignor is not a trustee for the assignee, his only obligation being to permit the use of his name in a suit by the assignee, and there is no occasion to resort to equity unless such permission is refused. Payment to the assignor after notice of the assignment will not discharge the debtor, as would be the case if the assignor were a trustee.

Ames' Cases on Trusts, pp. 59-69.
Haight's Questions and Answers, 388.

In jurisdictions like New York, where the assignee can sue in his own name, the distinction ceases to be important.

IV.

ELEMENTS OF A TRUST.

It is our purpose here to consider those elements which belong to *every* trust in *actual operation.* These are three, the subject or trust property, the object or *cestui que trust* and the trustee. They may be compared to the parts of a simple declarative sentence, the trust property to the subject of the sentence, the *cestui que trust* to the object, and the trustee to the verb, which applies the subject to the object. Certain cases and text writers give other elements, as for example, the settlor, sufficient words to create, a legal purpose, &c. It will be seen, however, that these relate to the *creation* of *express trusts,* and they will be considered under that head.

A. The Subject or Trust Property.

In General. In general any property which is capable of being legally transferred may be made the subject of a trust.

1 Perry on Trusts, Sections 67-69.

But not a mere direction that a certain solicitor be employed nor a request that two persons live together.

Foster v. Elsley, 19 Ch. D., 518; Ames' Cases on Trusts, 191, but see notes.

Graves v. Graves, 13 Ir. Ch. Rep., 182; Id., 192.

Property out of the Jurisdiction of the Court. Such property, even though it is real estate, may be the subject of a trust.

1 Perry on Trusts, Secs. 70-72.
Gardner v. Ogden, 22 N. Y., 327-339.
Sutphen v. Fowler, 9 Paige Ch., 280.
McCartney v. Bostwick, 32 N. Y., 53.
Jenkins v. Lester, 131 Mass., 355.

B. The Object or Cestui que Trust.

In General. The object of a trust must be carefully distinguished from its purpose. The word, as properly used, means the person to whose benefit the trust property is to be applied, while the word purpose indicates the end to be attained by such application. In general, any person who can take the legal title to property may be the beneficiary of a trust.

1 Perry on Trusts, Sec. 60.

Definite Object Necessary. In general every trust must have a certain and definite object, or one that can be ascertained by the ordinary rules of judicial construction, capable of enforcing the trust.

Morice v. The Bishop of Durham, 10 Ves., 522; Ames' Cases on Trusts, 195.
Holland v. Alcock, 108 N. Y., 312-324.
Prichard v. Thompson, 95 N. Y., 76.
Read v. Williams, 125 N. Y., 560, 567-570.
Fairchild v. Edson, 154 N. Y., 199, 210-212.

The trustees may be empowered to select from a designated class the individuals to be benefited, and if the class is not too large the trust will be valid; and in case of failure of the trustees to select, the property will be divided equally on the maxim, "equality is equity."

Power v. Cassidy, 79 N. Y., 602, 608-613.

But if the class is too large so that the trust could not be enforced in case of failure of the trustees to make a selection, it will be void.

Read v. Williams, *supra.*
Faiichild v. Edson, *supra.*

To the rule requiring a definite beneficiary, there is a great exception in the case of charitable trusts, to be considered below, and in that connection will also be discussed the effect of the New York statute of charitable trusts (Laws of N. Y., 1893, Ch. 701), which supersedes the law in regard to charitable trusts as declared in Holland v. Alcock and other New York cases, *supra.*

Trusts Without a Beneficiary. There are certain cases in which trusts without a beneficiary capable of enforcing the trust have been upheld and the trustees permitted to carry them out, if they were willing. Such are trusts to erect monuments, to take care of dogs and horses, to free slaves, to have masses said for the repose of souls, &c.

Mussett v. Bingle, Weekly notes (1876), 170; Ames' Cases on Trusts, 201.

In re Dean, 41 Ch. D., 552; Id., 205.

Ross v. Duncan, Freeman Ch. (Miss.), 587; Id., 212.

Reichenbach v. Quin, 21 L. R., Ir., 138; Id., 209.

This doctrine does not obtain in New York.

Holland v. Alcock, *supra.*

A similar disposition of property, *inter vivos,* has been, however, upheld on the theory that it was not a trust but a contract.

Gilman v. McArdle, 99 N. Y., 451.

And a gift to a charitable corporation limited to one or more of the purposes of such corporation, and with a provision that the corpus should be held in perpetuity and only the income used, would even before the statute of 1893 be supported as an absolute gift and not as a trust.

Wetmore v. Parker, 52 N. Y., 450, 457-460.

Bird v. Mirklee, 144 N. Y., 544.

See also:

Yale College's Appeal, 67 Conn., 237.

Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet., 99.

While dispositions of property to trustees without beneficiaries capable of enforcing the application of the property to the purpose intended are called trusts, I prefer not to consider them as true trusts but as *quasi*-trusts, for it cannot be said that there is any object.

Who May Be Beneficiaries. For a general discussion of this subject see:

1 Perry on Trusts, Secs. 61-66.

A state may be the beneficiary of a trust.

State v. Rusk, 23 Wis., 636.

A corporation may be a beneficiary.

Chamberlain v. Chamberlain, 43 N. Y., 424.
Sheldon v. Chappell, 47 Hun, 59.

But a corporation cannot take as beneficiary of a trust lands or property the legal title to which it has no power to take.

Coleman v. S. R. Turnpike Road Co., 49 Cal., 517.

Nor where an unlawful perpetuity is created, even though a direct gift to the corporation might be made with the same restrictions as to use.

Adams v. Perry, 43 N. Y., 487, 497, *et seq.*

A devise or bequest to trustees for a charitable purpose, with a direction to form a corporation will be valid as an executory devise or bequest to the corporation, even where the English doctrine of charitable trusts does not obtain.

Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet., 99.
Burrill v. Boardman, 43 N. Y., 254.

But the direction to form a corporation must be absolute.

Tilden v. Green, 130 N. Y., 29, 47.

An unincorporated association may be the beneficiary of a charitable or religious trust.

White v. Rice, 112 Mich., 403.
Second Cong. Soc. v. Waring, 24 Pick., 304.

Some cases hold that such an association may be the beneficiary of a trust not charitable (the individual members being, of course, the *cestuis que trust*).

Austin v. Shaw, 10 Allen (Mass.), 552.
Salem &c. Mills Co. v. Stayton &c. Co., 33 Fed. Rep., 146, 153.

But in New York a different rule obtains.

Murray v. Miller, 178 N. Y., 316.

Downing v. Marshall, 23 N. Y., at p. 382.

Pratt v. R. C. Orphan Asylum, 20 App. Div., 352.

But see:

King v. Townsend, 141 N. Y., 358.

An alien can have no greater rights to take as the beneficiary of a trust in real property than he has to take directly.

Leggett v. Dubois, 5 Paige Ch., 114.

But where a conversion into personality is contemplated at the creation of the trust, an alien may be the beneficiary.

Anstice v. Brown, 6 Paige Ch., 448.

C. The Trustee.

Trust Not to Fail for Want of Trustee. The fundamental rule with respect to the trustee is that a trust otherwise valid will not be permitted to fail for want of a trustee, but a court of equity will supply any vacancy by appointing a new trustee or by taking upon itself the execution of the trust.

Dodkin v. Brunt, L. R., 6 Eq., 580; Ames' Cases on Trusts, 226.

Adams v. Adams, 21 Wall., 185; Id., 227.

Dailey v. New Haven, 60 Conn., 314, 324.

Treat's Appeal, 30 Id., 113.

Sheldon v. Chappell, 47 Hun, at p. 63.

This rule is not always true as applied to charitable trusts, there being some cases where if there are no trustees who are willing and able to act the trust will fail.

Reeves on Real Property, Sec. 346.

This point will be more fully considered below.

Who May Be Trustee. For a general discussion of this subject see:

1 Perry on Trusts, Secs. 38-59.

1 Lewin on Trusts, *30.

The sovereign, including the United States, and any state, may be a trustee, but the trust cannot be enforced for the sovereign is not subject to be sued.

Pawlett v. Atty. Gen., Hard., 465; Ames' Cases on Trusts, 367.

Reeve v. Atty. Gen., 2 Atk., 223.

Penn v. Lord Baltimore, 1 Ves. Sr., at p. 453.

Briggs v. Light Boats, 11 Allen, 157.

Yale College's Appeal, 67 Conn., 237, 245.

Contra, both as to state and the United States,

Levy v. Levy, 33 N. Y., 97, 122.

If a public officer is named as trustee by the title of his office, the person who is the incumbent of the office when the trust goes into effect will take.

Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet., 99, 114.

Dunbar v. Soule, 129 Mass., 284.

The right of an alien to take title to real property as trustee is the same as his right to take title for his own benefit. If, however, the property reverts to the sovereign by reason of the alienage of the trustee the rights of the *cestui que trust* will very generally be recognized.

1 Perry on Trusts, Sec. 55.

Furguson v. Franklins, 6 Munf. (Va.), 305.

A non-resident may be a trustee.

Roby v. Smith, 131 Ind., 342.

Farmer's L. & T. Co. v. Chicago &c. Ry. Co., 27 Fed. Rep., 146.

Shirk v. City of LaFayette, 52 Id., 857.

But non-residence may be a ground for removal.

In re Harrison's Trusts, 22 L. J. Ch. (N. S.), 69; S. C., 15 Eng. Law & Eq. Rep., 345.

A corporation may be a trustee when authorized by its charter, or when the trust is one in which the corporation has an interest by reason of its purpose being to carry out

some purpose of the corporation, and this applies even to a municipal corporation.

Atty. Gen. v. Landerfield, 9 Mod. Rep., 286; Ames' Cases on Trusts, 216, and notes.

Green v. Rutherforth, 1 Ves. Sr., at p. 468.

McDonough's Exrs. v. Murdoch, 15 How. (U. S.), 367.

Perin v. Carey, 24 How. (U. S.), 465.

Webb v. Neal, 5 Allen (Mass.), 575.

Dublin Case, 38 N. H., at p. 577.

In re Newark Savings Institution, 28 N. J. Eq., 552.

But see:

Dailey v. New Haven, 60 Conn., 314, 319.

Fosdick v. Town of Hempstead, 125 N. Y., 581.

One corporation may be trustee for another where the beneficiary is authorized by its charter to assist in carrying out the purposes of the trustee.

Sheldon v. Chappell, 47 Hun, 59.

Chamberlain v. Chamberlain, 43 N. Y., 424.

But see:

Matter of Griffin, 45 App. Div., 102; reversed on other grounds, 167 N. Y., 71.

An unincorporated association may not be trustee, except of a charitable trust.

Trustees v. Hart's Exrs., 4 Wheaton, 1, 27.

Hart v. Hamberger, 1 N. Y. St. Rep., 293.

Persons *non sui juris*, as infants, married woman, &c., and even idiots and lunatics, may be trustees, subject, however, to their total or partial inability to execute the trust, by reason of their incapacity to perform legal acts.

Still v. Ruby, 35 Pa., 373; Ames' Cases on Trusts, 219.

People v. Webster, 10 Wend., 554.

Jevon v. Bush, 1 Vern., 342; Ames' Cases on Trusts, 217, and notes.

Sutphen v. Fowler, 9 Paige Ch., 280.

A person cannot be trustee for himself and when the legal and equitable estates vest in the same person the latter will merge in the former.

Rose v. Hatch, 125 N. Y., 427.

Goodright v. Wells, Douglas, 771; Ames' Cases on Trusts, 445.

Selby v. Alston, 3 Ves., 339.

But a beneficiary may be one of several trustees, and may administer the trust for all interested except himself, even though the other trustees refuse to act.

Rogers v. Rogers, 111 N. Y., 228.

Bundy v. Bundy, 38 N. Y. 410, 417.

Ex parte Conybeare's Settlement, 1 Wk. Rep., 458; Ames' Cases on Trusts, 2[illegible] notes.

And a beneficiary of a portion of the income may be sole trustee of the corpus and the balance of the income.

Woodward v. James, 115 N. Y., 346-357.

In order that the legal and equitable estates shall merge they must be equal in quantity.

Philips v. Brydges, 3 Ves., 120.

But see:

Bolles v. State Trust Co., 27 N. J. Eq., 308.

Woodward v. James, *supra.*

Nor will a merger take place where a contrary intention is evidenced.

Earle v. Washburn, 7 Allen (Mass.), 95.

V.

CLASSIFICATION.

Trusts are classified in various ways, but the most convenient way is according to the method of creation. On this basis they are divided into two classes, express trusts and implied trusts.

Express trusts are those created by the direct act of the parties, the intent being evidenced by spoken or written words.

Implied trusts are those raised by equity from the acts or situation of the parties, without an intent evidenced by words. These are divided into two classes, resulting trusts and constructive trusts.

Resulting trusts are those implied by equity from the acts of the parties according to their presumed intention.

Constructive trusts are those raised by equity to promote the ends of justice irrespective of the intention of the parties.

1 Perry on Trusts, Secs. 18-27.

VI.

EXPRESS TRUSTS.

A. Creation.

1. The Settlor.

Every express trust must be created by some person who is known as the settlor. Generally speaking any person who has power to transfer property directly, may transfer it in trust. See generally on this subject,

1 Perry on Trusts, Secs. 28-37.

Persons *non sui juris,* as married woman, infants, etc., are generally incapacitated from creating trusts.

Graham v. Long, 65 Pa., 383.

The acts of an infant being merely voidable, a declaration of a trust made before coming of age may be ratified by subsequent acts.

Ownes v. Ownes, 23 N. J. Eq., 60.

2. Method of Creation.

A trust may be created either by a transfer of property, by the owner thereof, to another, in trust for a third person, or by a declaration on the part of the owner that he holds the property in trust for another.

a. Sufficiency of Language.

In General. No particular form of words is necessary to create a trust, the words trust and trustee need not be used, but words must be used from which the court can see or infer an intention to create a trust. Whether the language is sufficient must be determined in each case according to the usual methods of construction. The following are instances of language held sufficient:

Woodward v. James, 115 N. Y., 346.
Hamer v. Sidway, 124 N. Y., 538.
Barry v. Lambert, 98 N. Y., 300.

Precatory Expressions. The most difficult cases in which to determine whether a trust is intended arise in cases of precatory expressions in wills. These are words of expectation, recommendation, desire, hope or entreaty, that the legatee or devisee of property will apply it or some portion of it to some use other than his own benefit. The question to be determined is whether the words were intended to be imperative and control the discretion of the person addressed, or are merely precatory, and intended only to influence the discretion of such person. In this inquiry each case must stand by itself, and no very satisfactory rules can be laid down, nor can the adjudged cases be satisfactorily classified. The classification herein attempted, following in the main that of Prof. Ames, is probably the best that can be devised. It is based in part upon the rule laid down in Briggs v. Penny (13 MacN. & Gord., 546, 554), wherein it was said that precatory words would be deemed to import a trust on three conditions, "first, that they are so used as to exclude all option or discretion in the party who is to act as to his acting according to them or not; secondly, the subject must be certain, and thirdly, the objects must not be too vague or indefinite to be enforced." The courts, however, have not, in general, followed any particular rules, deciding each case on its own merits. The tendency of the more recent authorities is against holding such expressions imperative. The usual methods of construction are adopted, the whole instrument and surrounding circumstances being considered.

The following cases are instances of precatory expressions construed as imperative:

Colton v. Colton, 127 U. S., 300.
Phillips v. Phillips, 112 N. Y., 197.
Collister v. Fassitt, 163 N. Y., 281.
Blanchard v. Chapman, 22 Ill. App., 341.
Noe v. Kern, 93 Mo., 367.
Eberbart v. Perolin, 48 N. J. Eq., 592.

The following cases are instances where the intention was clear not to create a trust:

Bacon v. Ransom, 139 Mass., 117.
Matter of Keleman, 126 N. Y., 73.
Fairchild v. Edson, 154 N. Y., 199, 212-214.

It is a general rule that where an absolute devise or bequest is made to one, followed by words of inheritance or succession, or words indicating that absolute control or right of disposition is intended to be conferred, such gift will not be limited nor cut down by any subsequent expression less clear and definite.

Post v. Moore, 181 N. Y., 15.
Clay v. Wood, 153 N. Y., 134.
Clark v. Leupp, 88 N. Y., 228.
Aldrich v. Aldrich, 172 Mass., 101.

Where the testator attempts to control the disposition of property not his own nor derived from him, the expression will be considered merely a request.

Palmer v. Schribb, 2 Eq. Cas. Abgd., 291, pl. 9; Ames' Cases on Trusts, 77, and notes.

The following are instances where the subject was not defined, and it was held that there was no trust, though that reason was not always assigned:

Rose v. Porter, 141 Mass., 309.
Lawrence v. Cooke, 104 N. Y., 632.
Sturgis v. Paine, 146 Mass., 354.
Russell v. U. S. Trust Co., 136 Fed. Rep., 758.

The following are instances where the beneficiaries were indefinite, and it was held that there was not a trust:

Stead v. Mellor, 5 Ch. D., 225; Ames' Cases on Trusts, 91, and notes.
Giles v. Anslow, 128 Ill., 187.

But in the following cases there was held to be a trust, although the beneficiaries were indefinite, and the trust invalid on that account:

Willetts v. Willetts, 20 Abb. N. C., 471.
Matter of Ingersoll, 131 N. Y., 573.

Where a power of selection among individuals of a definite class is given to the person to whom the precatory

expressions are addressed, trusts have in some instances been held to have been intended.

Cox v. Wills, 49 N. J. Eq., 130; reversed on other grounds, Id., 573.

But not in other instances:

Foose v. Whitmore, 82 N. Y., 405.
Davis v. Mailey, 134 Mass., 588.

Trusts based on precatory expressions are sometimes classed as implied trusts, but this I consider incorrect. Implied trusts properly so called, arise only where there is no language used by the parties to indicate an intention to create a trust. If any language is used it is merely a matter of interpretation and construction.

b. Consideration.

When Necessary. It is said that equity will not aid a volunteer. This means that equity will not declare a trust for the benefit of a volunteer, but if a trust is completely created equity will enforce it, even at the instance of a volunteer.

Ellison v. Ellison, 1 White & Tudor, *291.
Van Cott v. Prentice, 104 N. Y., 45.

In the case of voluntary settlements the question whether a trust is completely created or the settlement otherwise completely effected, becomes therefore very important. There are three methods of effecting such a settlement; first, by direct gift or transfer to the donee, in which case the donor must do every act necessary to be done by him to divest himself of the legal title where that is possible and vest it in the donee; second, by transfer of title to a third person in trust for the donee, in which case a similar rule applies except that the title is to be vested in the trustee; and third, by the donor declaring himself a trustee for the donee, in which case he must do every act necessary to be done by him to divest himself of the beneficial interest and vest it in the donee. If a settlement is attempted in any one of the three ways indicated, and is not perfectly

carried out, equity will not enforce it at the instance of a volunteer by resorting to one of the other methods, as, for example, if there is an attempt to create a trust in a third person for the benefit of the donee, and a failure to transfer the legal title to the trustee, equity will not declare the settlor a trustee.

Milroy v. Lord, 4 DeG., F. & J., 264; Ames' Cases on Trusts, 149.

Where a direct gift is attempted, but fails for want of a sufficient transfer of the legal title, equity will not declare the donor a trustee.

Richards v. Delbridge, L. R., 18 Eq., 11; Ames' Cases on Trusts, 130.

Young v. Young, 80 N. Y., 422, 436.

The settlor may, however, declare himself a trustee for the beneficiary in which case there is no necessity for a transfer of the legal title, which may remain in the settlor.

Locke v. Farmers' Loan & Trust Co., 140 N. Y., 135, 141-143.

In re Smith's Est., 144 Pa. St., 428.

When Settlement Perfected—Transfer of Title to Donee or Trustee. The question whether a settlement is perfected is a question of fact in each case. A few general rules are, however, deducible from the authorities. If the settlement is to be effected by direct gift or transfer to a trustee, the settlor must, if he have the legal title to the property, and the property is capable of a legal transfer, do everything necessary to be done by him to effectually transfer the legal title to the donee or trustee. Space will not permit a detailed consideration of what is necessary to constitute a legal transfer of different kinds of property. The following cases are instances of transfers held sufficient:

Dougherty v. Shillingsburg, 175 Pa. St., 56.

Brown v. Sphor, 87 App. Div., 522; affd., 180 N. Y., 201.

Fortescue v. Barnett, 3 M. & K., 36; Ames' Cases on Trusts, 136.

The following cases are instances of attempted transfers held insufficient:

> Loring v. Hildreth, 170 Mass., 328.
> Richards v. Delbridge, *supra.*
> Welch v. Henshaw, 170 Mass., 409.
> Sullivan v. Sullivan, 161 N. Y., 554.
> Young v. Young, *supra.*
> Milroy v. Lord, *supra.*
> Wadd v. Hazelton, 137 N. Y., 215.
> Beaver v. Beaver, 117 N. Y., 421.

Where, however, the settlor has not the legal title to the property, but only an equitable interest, or where the property is not capable of a legal transfer, it is generally held sufficient for the settlor to transfer the equitable title to the donee or trustee, and failure to comply with the formalities necessary to transfer the legal title to property of a similar nature will not invalidate the settlement.

> Sloane v. Cadogan, Sugden on Vendors and Purchasers, App., No. 24; Ames' Cases on Trusts, 135.
> Donaldson v. Donaldson, Kay, 711; Id., 146.
> Tarbox v. Grant, 56 N. J. Eq., 199.

Contra,

> Edwards v. Jones, 1 M. & C., 226; Ames' Cases on Trusts, 140 (see also notes).

And it has even been held that where the recognized legal effect of a direct assignment of stock was to make the assignor trustee for the assignee, a trust was established, although the property was capable of legal transfer.

> Collins v. Lewis, 60 N. J. Eq., 488.

The settlor need not do everything necessary to vest a complete legal title in the donee or trustee, he need only do every act which is necessary to be done by *him* to effect that result. The fact that something remains to be done by the donee or trustee to obtain a complete legal title, as to give notice to a debtor, or to trustees, or to secure a trans-

fer of stock on the company's books, will not prevent the enforcement of the settlement in equity.

Fortescue v. Barnett, *supra.*
Donaldson v. Donaldson, *supra.*

When Trust Perfectly Created—Settlor Declaring Himself a Trustee. The following are instances of voluntary settlements which have been supported, where the settlor has declared himself a trustee, without transfer of the title:

Ex parte Pye, 18 Vesey, 140; Ames' Cases on Trusts, 123.
Locke v. Farmers' Loan & Trust Co., *supra.*
In re Smith's Est., 144 Pa. St., 428.
Westlake v. Wheat, 43 Hun, 77.
Phipard v. Phipard, 55 Hun, 433.
Pingrey v. Nat. Life Assn., 144 Mass., 374.
Kendrick v. Ray, 173 Id., 305.
Janes v. Falk, 50 N. J. Eq., 468.
Collins v. Lewis, *supra.*
McPherson v. Rollins, 107 N. Y., 316.

But see:

Townsend v. Rackham, 143 N. Y., 516.

See as to common law rule relating to real property:

Pitman v. Pitman, 107 N. C., 159.

The authorities are contradictory as to whether in such a case there must be a delivery of the instrument creating the trust, or some act equivalent thereto. The following support the doctrine that there need be no delivery:

1 Perry on Trusts, Sec. 103 (but see note (a) thereto).
28 Am. & Eng. Encyc. of Law, 2d. Ed., 899, note 2.
Phipard v. Phipard, 55 Hun, 433.
In re Smith's Est., *supra.*

Contra.

1 Perry on Trusts, note (a) to Sec. 103.
Govin v. De Miranda, 79 Hun, 286; S. C., 76 Hun, 414, 419.

For a discussion of the topic see:

Reeves on Real Property, Sec. 319.

Power of Revocation. Reservation by the settlor of a power of revocation does not render a trust otherwise perfectly created imperfect.

Van Cott v. Prentice, *supra.*

Locke v. Farmers' Loan & Trust Co., *supra.*

Brown v. Sphor, *supra.*

Notice to Beneficiary. Notice to the beneficiary is not always essential to the creation of a perfect trust, but it is a strong fact indicating the settlor's intention.

Martin v. Funk, 75 N. Y., 134.

Clark v. Clark, 108 Mass., 522; Ames' Cases on Trusts, 232.

Welch v. Henshaw, *supra.*

Townsend v. Rackham, *supra.*

Savings Bank Trusts. Under this head come what are commonly known as "savings bank trusts," which require special consideration. When a person deposits money in a savings bank in his own name in trust for another, without more, and retains the pass-book, and no notice is given to the person named as beneficiary, the question arises whether a trust is created or not. The matter has been settled in New York, at least, by the following rule; namely: that such a disposition is a tentative trust merely, subject to revocation during the life of the depositor, but if the depositor dies before the beneficiary without having revoked the trust by withdrawal or otherwise, any money then remaining on deposit to the credit of such account will become the property of the beneficiary.

Matter of Totten, 179 N. Y., 112.

Martin v. Funk, 75 N. Y., 134.

Willis v. Smith, 91 N. Y., 297.

Merigan v. McGonigle, 205 Pa. St., 321.

The depositor may revoke the trust during his lifetime by merely withdrawing the deposit or otherwise.

Matter of Totten, *supra.*

So if the beneficiary dies before the depositor, the trust will be thereby revoked.

Cunningham v. Davenport, 147 N. Y., 43.

Haux v. Dry Dock Savings Instn., 2 App. Div., 165; affd., 154 N. Y., 736.

The depositor may, however, by other acts, as by delivery of the pass-book, declarations at the time of the deposit, &c., create an irrevocable trust.

Farleigh v. Cadman, 159 N. Y., 169.

Robinson v. Appleby, 69 App. Div., 509; affd., 173 N. Y., 626.

O'Brien v. Williamsburgh Savings Bank, 101 App. Div., 108 .

In Massachusetts, notice to the beneficiary is necessary to establish such a trust.

Brabrook v. Boston Five Cents Savings Bank, 104 Mass., 228.

Clark v. Clark, 108 Id., 522; Ames' Cases on Trusts, 232.

What Consideration Sufficient. It may be said in a general way that any consideration which will support a contract will support a trust. The surrender or abridgment of any legal right constitutes consideration.

Hamer v. Sidway, 124 N. Y., 538.

Day v. Roth, 18 N. Y., 448, 455.

A meritorious consideration is insufficient.

Matter of James, 146 N. Y., 78, 92-95.

An illegal consideration will not support a trust.

Bettinger v. Bridenbecker, 63 Barb., 395.

But see:

Ownes v. Ownes, 23 N. J. Eq., 60.

c. Necessity of a Writing.

A[1]. At Common Law.

Real Property. In the absence of statute a trust can be created by parol and manifested or proved by parol

evidence, and a writing is unnecessary, even where real property forms the subject.

1 Perry on Trusts, Secs. 73-77.
Harvey v. Gardner, 41 Ohio St., 642.

But at common law, a trust in real property if declared by parol must be declared in connection with a conveyance operating by way of transmutation of possession, and if attempted to be created without such conveyance, as by covenant to stand seised, must be created by deed under seal, and perhaps also supported by a consideration, unless the property rests in grant.

Pitman v. Pitman, 107 N. C., 159.

Personal Property. A trust in personal property may be created and proved by parol.

Barry v. Lambert, 98 N. Y., 300.

B[1]. Under the Statute of Frauds.

The Statute of Frauds in general requires a trust affecting real property to be "manifested or proved by some writing signed by the party who is enabled by law to declare such trust or by his last will in writing." For the text of the English Statute, and the modifications in the several states, see:

Ames' Cases on Trusts, 176, and note 1.
28 Am. and Eng. Encyc. of Law, 874 *et seq.*

For the New York Statute, see:

Laws of New York, 1896, Ch. 547, Secs. 207, 234,
Birdseye's R. S., 3rd. Ed., Vol. III., 3050, 3060.

Sufficiency of Writing. The writing must be signed by the beneficial owner of the property at the time the trust is created, as he is the person enabled to declare a trust. It need not be signed by the trustee.

Tierney v. Wood, 19 Beav., 330; Ames' Cases on Trusts, 182.

The grantee in a conveyance absolute on its face is, in the eye of the law, the beneficial owner of the property

conveyed, and therefore the person capable of declaring a trust in such property, and this is true even if he took the conveyance upon an oral trust, for such trust is void by the Statute of Frauds.

Myers v. Myers, 167 Ill., 52, 62.
Hutchins v. Van Vechten, 140 N. Y., 115.

Subsequent declarations by the grantor in such conveyance, be they oral or written, are ineffectual to cut down the estate conveyed.

Harvey v. Gardner, *supra.*
Myers v. Myers, *supra.*

Unless the statute requires a trust to be created by a writing it is sufficient if it be manifested or proved by a writing, which may be executed after it is created.

Hutchins v. Van Vechten, 140 N. Y., 115.
Aller v. Crouter, 64 N. J. Eq., 381, 390.
Stratton v. Edwards, 174 Mass., 374.
McClellan v. McClellan, 65 Me., 500.

This is the rule in most jurisdictions. It was not, however, the rule in New York between 1830 and 1860. The statute then in force required a trust affecting real property to be created by a writing. For the rules in the various states see:

Ames' Cases on Trusts, p. 178.
Am. & Eng. Encyc. of Law, *supra.*

The writing must show the trust completely without resort to parol testimony.

Cook v. Barr, 44 N. Y., 156
Dillaye v. Greenough, 45 N. Y., 438.
Martin v. Baird, 175 Pa. St., 540, 547.

The declaration may consist of several writings and if properly connected by reference only one need be signed.

McClellan v. McClellan, 65 Me., 500.
Van Cott v. Prentice, 104 N. Y., 45.

An answer in a suit in equity is a proper writing if it contain a sufficient statement of the trust.

Cook v. Barr, *supra,* (*semble*).

When Statute Does Not Apply. If a trust in real property is created by parol and the trustee performs the obligation imposed upon him by the terms of the trust, the statute no longer applies; and this is true where the property has been disposed of in pursuance of the trust and replaced by personal property which the trustee refuses to surrender or apply.

Bork v. Martin, 132 N. Y., 280.
Robbins v. Robbins, 89 N. Y., 251.
Silvers v. Potter, 48 N. J. Eq., 539.
Polk v. Boggs, 122 Cal., 114.

And where the party seeking to enforce the trust has performed or partly performed his part of an oral agreement out of which the trust arises, and it would work a fraud to permit the other party to escape under cover of the statute, equity follows the rule that it will not permit the statute to become an instrument of fraud, and will declare a constructive trust.

Ryan v. Dox, 34 N. Y., 307.
Canda v. Totten, 157 N. Y., 281.

The mere payment of purchase money or the mere breach of an oral agreement is not in general enough to take the case out of the statute. There must have been some interest in the subject matter prior to the arrangement, which, by reason thereof, the party seeking to establish a trust has failed to protect by other means, or other grounds of equitable interference.

Bispham's Equity, Sec. 385.
Levy v. Brush, 45 N. Y., 589.
Dunckel v. Dunckel, 141 N. Y., at p. 435.
Pawling v. Pawling, 86 Hun, 502.

This point will be more fully considered under the head of constructive trusts.

Personal Property. The Statute of Frauds does not

in most jurisdictions require a trust in personal property to be created, manifested or proved by a writing.

Barry v. Lambert, *supra.*
Chase v. Perley, 148 Mass., 289, 294.
Danser v. Warwick, 33 N. J. Eq., 133; Ames' Cases on Trusts, 186.

But the oral evidence must be clear and convincing.

Allen v. Withrow, 110 U. S., 119.

In New York a trust in personal property must be assigned by a writing.

Laws of New York, 1897, Ch. 417, Sec. 21, Birdseye's R. S., 3d Ed., Vol. II., p. 2634.

C^1. Under Statute of Wills.

In General. It is almost needless to say that if an attempt is made to create a testamentary trust, it must be done by will duly executed as required by statute. Not only must the fact of the trust appear therefrom, but also its terms, so that they can be ascertained without resort to extrinsic evidence (except such as is admissible for purposes of construction).

Juniper v. Batchelor, Weekly Notes (1868), 197; Ames' Cases on Trusts, 189, and notes.

What Trust Testamentary. It is often difficult to determine whether a disposition is testamentary or not. If an attempt is made, otherwise than by will, to create a trust to take effect—that is, title to pass—only on the decrease of the settlor, it will be invalid.

Towle v. Wood, 60 N. H., 434.

But the mere reservation of a power of revocation to the settlor during his life will not invalidate a trust created by deed.

Van Cott v. Prentice, 104 N. Y., 45.
Brown v. Spohr, 87 App. Div., 522; affd., 180 N. Y., 201.

So also the settlor may reserve to himself the beneficial enjoyment of the property during his life, if there be a present transfer of the title.

Kelly v. Parker, 181 Ill., 49.

P. R. R. Co. v. Stevenson, 63 N. J. Eq., 634, 638.

And he may reserve both the beneficial enjoyment and power of revocation.

Kelly v. Parker, *supra.*

Fraud. If a testator is induced to make a will in favor of a person by the latter's oral promise to apply the property willed to some purpose other than his own benefit, or if a person is induced to refrain from making or altering a will by a like promise made by one who would but for the intended will or alteration become entitled to some portion of the former's property, and such person receives the property and refuses to perform the oral trust, such refusal is a fraud, and equity will raise a constructive trust.

O'Hara v. Dudley, 95 N. Y., 403.

This subject will be more fully considered under the head of constructive trusts.

B. Validity of Purpose.

1. At Common Law.

In the absence of a statute limiting the purposes for which express trusts may be created, it would seem that an express trust may be created for any purpose not generally illegal.

Reeves on Real Property, Sec. 334.

If it is merely a passive trust in real estate, created by declaring a use upon a use, it will in most jurisdictions be executed by statute, and the legal title vested in the *cestui que trust.* Passive trusts in real property, even where legal are now very rare. See:

Reeves on Real Property, Sec. 330.

3 Pomeroy's Equity Jurisprudence, 3d Ed., Sec. 988.

A trust also may be invalid in whole or in part because in conflict with a statute or rule against perpetuities.

2. Under New York Statutes.

a. Real Property.

In General. The Revised Statutes, passed in 1830, abolished all express trusts and uses except those permitted by statute. These provisions are now embodied in the Real Property Law, Laws of 1896, Ch. 547, Secs. 70-94.

Birdseye's R. S., 3d Ed., Vol. III., pp. 3024-3032.

Passive Trusts. All passive trusts are abolished, and the legal title vested in the person beneficially entitled.

Real Property Law, Secs. 72 and 73.
Verdin v. Slocum, 71 N. Y., 345.

Whether a trust is active or passive is a question of fact in each case, depending on the intention to be ascertained by a construction of the instrument creating the trust. Where the beneficiary is given power to dispose of or take possession of the corpus, at his option, the trust will generally be declared passive.

Wainwright v. Low, 132 N. Y., 313, 319.
Wendt v. Walsh, 164 N. Y., 154.

In the following cases where the question was raised the trusts were held to be active:

Kiah v. Grenier, 56 N. Y., 220, 225.
Donovan v. Van De Mark, 78 N. Y., 244.

Where an active trust becomes passive, the statute at once executes it and vests the legal title in the beneficiary.

Hopkins v. Kent, 145 N. Y., 363.

Express Trusts Permitted by Statute: In General. Four classes of express trusts are permitted by statute, any trust not included in one of these classes is invalid as a trust.

N. Y. Dry Dock Co. v. Stillman, 30 N. Y., 174.

Same Subject: First Class. "To sell real property for the benefit of creditors." (Real Property Law, Sec. 76, Subd. 1.)

This provision authorizes general assignments for the benefit of creditors, whenever the same cover real property, but it is not limited to general assignments, and a debtor may, if solvent, convey a portion of his property to a trustee to pay a portion of his debts, with a proviso that any surplus shall be returned to him.

Knapp v. McGowan, 96 N. Y., 75, 84-87.

The direction to sell must be imperative.

Heermans v. Burt, 78 N. Y., 259.
Weorz v. Rademacher, 120 N. Y., 62.

Same Subject: Second Class. "To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon." (Id., Subd. 2).

The following is an instance of a valid trust under this subdivision:

Russell v. Hilton, 80 App. Div., 178, 187.

The direction to sell, mortgage or lease must be imperative.

Cooke v. Platt, 98 N. Y., 35.
Henderson v. Henderson, 113 N. Y., 1, 8-13.
Steinhardt v. Cunningham, 130 N. Y., 292, 300.
Weeks v. Cornwell, 104 N. Y., 325-340.

A question early arose as to the meaning of the word "lease" in this subdivision, some authorities maintaining that it meant to lease at a rental payable at stated periods, and apply the income thus received to the reduction of incumbrances, etc. It was eventually pointed out, however, that such a construction would authorize an accumulation expressly prohibited by another section of the statute (see below), and therefore the word has been authoritatively settled to mean a lease by way of alienation —that is, for a fixed period, for a lump sum, or to the

person entitled to the sum charged for a period sufficient to satisfy the same.

Hascall v. King, 162 N. Y., 134, 145; overruling Becker v. Becker, 13 App. Div., 342, 346.

See cases cited in these authorities for the history of the discussion.

Same Subject: Third Class. "To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto." (Id., Subd. 3.)

A trust under this subdivision need not dispose of the entire income, and a trust to pay annuities is valid, and the trustees take title to the entire corpus, although only a portion of the income is necessary for the annuities.

Cochrane v. Schell, 140 N. Y., 516.

It is not sufficient merely to authorize the collection of the rents and profits; they must be devoted to the use of some beneficiary.

Holly v. Hirsch, 135 N. Y., 590.
Henderson v. Henderson, *supra.*

Same Subject: Fourth Class. "To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits prescribed by law." (Id., Subd. 4.)

For the accumulations permitted by law, see:

Real Property Law, §51, Birdseye's R. S., 3d Ed., Vol. III., p. 3022.

The accumulation must be for the sole benefit of the infant during whose minority it is to continue. If, therefore, the accumulations are directed to be added to the corpus and handed over to remaindermen, the provision is invalid, even though the life beneficiary is to receive the income produced by such accumulations during his life after minority.

Pray v. Hegeman, 92 N. Y., 508.

It seems, however, that a testator may provide for the disposition of accumulated income in case the infant for whose benefit the accumulation is directed should not live to reach the age of twenty-one years.

Smith v. Parsons, 146 N. Y., 116.

A direction to devote a portion of the rents and profits of real property to the reduction of mortgages thereon, or on other real property belonging to the estate, is unlawful, for such application of the income would increase the corpus of the estate.

Hascall v. King, 162 N. Y., 134.

It seems, however, that a direction to apply income to the necessary improvement of property used in a business which the trustees are directed to carry on is not illegal.

Matter of Nesmith, 140 N. Y., 609-615.

Perpetuities. As the interest of the beneficiary in a trust of the third class is inalienable (Real Property Law, Sec. 83, as amended by Laws of 1903, Chapter 88), such a trust must be limited to two lives in being from the date of the instrument creating the trust, or in case of a trust created by will, from the decease of the testator.

Real Property Law, §32, Birdseye's R. S., 3d Ed., Vol. III., p. 3019.
Woodgate v. Fleet, 64 N. Y., 566.
Beekman v. Bonsor, 23 N. Y., 298, 314-316.
Van Cott v. Prentice, 104 N. Y., 45, 56-58.

The lives by which the duration of the trust is measured need not be the lives of the beneficiaries, provided, however, there is nothing in the terms of the trust to keep it alive beyond the lives of the beneficiaries.

Crooke v. County of Kings, 97 N. Y., 421, 435-440.
Bailey v. Bailey, Id., 460.

Where there are more than two life beneficiaries (assuming their lives to be the measure of the duration of the trust) the trust is invalid unless the corpus is capable under the instrument of trust of being divided into several

funds, in which case there will be a separate trust as to each.

Locke v. Farmers' Loan & Trust Co., 140 N. Y., 135, 143-145.

Allen v. Allen, 149 N. Y., 280.

Robb v. Washington and Jefferson College, 103 App. Div., 360.

And see:

Denison v. Denison, Id., 523.

In trusts under the other subdivisions there is no suspension of the power of alienation by law, and consequently no perpetuity unless the instrument creating the trust directs the property to be held for an unlawful period.

In such case the provision will be invalid.

Adams v. Perry, 43 N. Y., 487, 497-500.

But permission to defer a directed sale of real property for three years is not objectionable.

Robert v. Corning, 89 N. Y., 225.

When Statute Does Not Apply. When the trustee is beneficially interested in the property the statute has been held not to apply.

King v. Townshend, 141 N. Y., 358, 363.

When the instrument creating the trust directs real property to be sold, and the proceeds are to be devoted to certain trusts, the statute does not apply to such trusts. By the rule of equitable conversion they are treated as trusts of personalty.

Russell v. Hilton, 80 App. Div., 178, 186-187.

Kane v. Gott, 24 Wend., 641, 659-664.

b. Personal Property.

Not Within Statute. The New York statute of uses and trusts does not apply to personal property, hence a trust in such property may be created for any purpose valid at common law.

Holmes v. Mead, 52 N. Y., 332, 342-344.

Kane v. Gott, *supra*.

Accumulations. Accumulations in personalty are permitted on substantially the same conditions as in realty.

Personal Property Law, Laws of 1897, Ch. 417, §4; Birdseye's R. S., 3d Ed., Vol. II., p. 2632.

Perpetuities. The provisions as to perpetuities and alienability of the beneficiary's interest are substantially the same as those for real property.

Personal Property Law, §§2 & 3 (the latter amended by Laws of 1903, Ch. 87).

c. Invalid Trust Enforced as Power in Trust.

"Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article no estate shall vest in the trustees, but the trust, if directing or authorizing the performance of any act which may lawfully be performed under a power, shall be valid as a power in trust subject to the provisions of this chapter." (Real Property Law, part of §79; Birdseye's R. S., 3d Ed., Vol. III., p. 3026.)

N. Y. Dry Dock v. Stillman, *supra.*
Henderson v. Henderson, *supra.*
Sternhardt v. Cunningham, *supra.*
Weeks v. Cornwell, *supra.*
Holly v. Hirsch, *supra.*

3. Where Trust Partially Invalid.

If there are several distinct trusts created by one instrument and some are valid and others not, those which are valid will be enforced.

If, however, the valid and invalid provisions are parts of a single scheme and those which are invalid can be separated from the rest and disregarded without interfering with the valid provisions, the courts will enforce the valid provisions.

Adams v. Perry, 43 N. Y., 487, 500.
Smith v. Chesebrough, 176 N. Y., 317.
Denison v. Denison, 103 App. Div., 523.

But if the invalid provisions form the foundation of the scheme, so that to cut them out would destroy the main purpose of the creator of the trust, the subsidiary valid provisions must fail also.

Holmes v. Mead, 52 N. Y., 332, 344.

4. Conflict of Laws—New York Rule.

Where property is given to trustees upon a trust to be executed in another state, which is valid by the laws of that state, and all our courts have to do is to direct the property to be turned over to the foreign trustees, the trust will be enforced to that extent, though it would be invalid if it were to be executed here.

Chamberlain v. Chamberlain, 43 N. Y., 424.

This rule cannot be applied where real property is concerned unless a conversion is directed.

And where the resident of another state makes a bequest of *personal property* upon trusts valid by the laws of his domicile, to be executed in this state, it will be enforced by our courts though invalid by our laws.

Cross v. U. S. Trust Co., 131 N. Y., 330, 339.

See also:

Dammert v. Osborn, 140 N. Y., 30.

C. Express Trusts for Special Purposes.

1. Spendthrift Trusts.

Spendthrift trusts are those which provide for the payment of the income of the trust property to the beneficiary, but prohibit his interest from being alienated and the income from being anticipated or subjected in advance of payment to the claims of his creditors. Such trusts are generally illegal.

Reeves on Real Property, Sec. 335.

In New York, all trusts authorized by Subdivision 3, of Section 76, of the Real Property Law, are by statute

spendthrift trusts to the extent that the income is necessary for the maintenance and education of the beneficiary.

Real Property Law, Laws of 1896, Ch. 547, Secs. 78 & 83; as amended by Laws of 1903, Ch. 88.

Personal Property Law, Laws of 1897, Ch. 417, Sec. 3, as amended by Laws of 1903, Ch. 87.

The rights of creditors to the surplus will be considered below.

2. Trusts for Married Women.

In General. By the common law the property rights of a married woman were completely subordinated to the control of her husband. In the theory of the law he was expected in return to pay her debts and provide for her according to her station in life, but in many cases husbands failed to do this, and thus a woman who had had property might be left without proper means of support for herself and her children, and the remedies furnished by the common law were inadequate. To provide for this condition, the Court of Chancery took upon itself to enforce trusts for the separate use of married women. By the usual terms of such a trust property was vested in trustees the income to be paid to the married woman, during her life "for her sole and separate use," with remainder usually containing some provision for the children of the marriage. Such trusts might, however, be created with very little formality, and if in any conveyance of property to a woman by will or *inter vivos* it was declared that it was to be for her sole and separate use, equity would treat it as a trust for her benefit, and enable her to enjoy it free from the control of her husband. An important question which early arose in regard to these trusts, was whether the wife could alienate her interest, and it was decided by Chancery that she had the same power over it as a *femme sole*, and hence could alienate it. Thus in many cases the object of the trust was frustrated. Lord Thurlow finally invented the clause against anticipation, which if inserted in the instrument of settlement, prevented the married woman from alienating her interest in the income of the trust property.

Another question over which there has been great discussion is whether in case the woman was unmarried when the property was conveyed to her for her sole and separate use, or afterward became *discovert*, the trust would attach in case of any subsequent marriage. Different rules have been adopted in different states. In Massachusetts, for example, the settlement must be made in favor of a woman then married or in immediate contemplation of marriage, and if she subsequently becomes *discovert* and afterwards marries again, the property will be subject to the control of her husband as other property.

In many other states it has been held that where property is conveyed to a woman for her sole and separate use, whether she be then married or single, the trust will attach whenever and as often as she becomes *covert*, but when *discovert* the property will be subject to her absolute control as her other property.

For a general discussion of this subject see:

Reeves on Real Property, Sec. 336.
2 Perry on Trusts, Secs. 625-686.

In New York such trusts are now of no importance, for a married woman has by statute the same control of her property as a *femme sole*. If it is desired to prevent her alienating it, a trust can be created under Subdivision 3, of Section 76, of the Real Property Law.

3. Charitable Trusts.

In General. Charitable trusts are those created for a charitable purpose, and differ from other express trusts in that the beneficiaries need not be certain and definite. Trusts of this character were early enforced by the Court of Chancery, and were afterward regulated by the Statute of Charitable Uses, enacted in 43 Elizabeth, which has been since regarded as pointing out in a general way the purposes for which such trusts might be created—that is. trusts of this character have been limited to those created for some purpose specified in the statute of Elizabeth, or

related thereto, or else created for purposes of charity generally.

Morice v. The Bishop of Durham, 10 Ves., 522; Ames' Cases on Trusts, 195.

For a general discussion of the subject, see:

Reeves on Real Property, Secs. 337-350.
Jackson v. Phillips, 14 Allen (Mass.), 539.

In the United States. Charitable trusts are generally recognized and enforced in the United States. It was at first supposed that they had their origin in the Statute of 43 Elizabeth, and hence in states where that statute had been repealed such trusts were in some instances declared invalid.

Trustees v. Hart's Exrs., 4 Wheaton 1.

Later, however, it was discovered that the jurisdiction of Chancery over these trusts antedated that statute, and was therefore inherent, hence in general they have been supported even where that statute is not in force.

Vidal v. Girard's Exrs., 2 How. (U. S.), 127, 191-197, and note 155-161.
Perin v. Carey, 24 How. (U. S.), 465.

Purposes. The purposes for which charitable trusts may be created may for the most part be divided into four classes, religious, educational, eleemosynary and governmental.

Reeves on Real Property, Sec. 339.

Religious Purposes. The following are instances of valid trusts for religious purposes:

McAlister v. Burgess, 161 Mass., 269.
Christ Church v. Trustees, 67 Conn., 554.
Alden v. St. Peter's Church, 158 Ill., 631.

Trusts for the repose of souls have been held to be with-

in this class on the ground that the persons attending the services would receive a benefit.

Hoeffer v. Clogan, 171 Ill., 462.

Contra,

Festorazzi v. St. Joseph's Ch., 104 Ala., 327.

See also:

Gilman v. McArdle, 99 N. Y., 451.

Educational Purposes. The following are instances of valid trusts for educational purposes:

Perin v. Carey, *supra.*
People v. Cogswell, 113 Cal., 129, 136.
George v. Braddock, 45 N. J. Eq., 757.
Treat's Appeal, 30 Conn., 113.
Bedford v. Bedford's Admr., 99 Ky., 273.

A trust to secure the passage of laws granting political rights to woman by means of the "preparation and circulation of books, the delivery of lectures," etc., is not a valid charitable trust.

Jackson v. Phillips, 14 Allen (Mass.) 539, 571.

Eleemosynary Purposes. The following are instances of valid trusts for eleemosynary purposes:

Towle v. Nesmith, 69 N. H., 212.
Trim's Est., 168 Pa. St., 395.
Haines v. Allen, 78 Ind., 100.
Darcy v. Kelly, 153 Mass., 433.
Dailey v. New Haven, 60 Conn., 314.

Governmental Purposes. The following is an instance of a valid trust for governmental purposes:

Est. of Smith, 181 Pa. St., 109.

General Charitable Purpose. Trusts for purposes of charity in general are valid in England.

Morice v. The Bishop of Durham, *supra.*

In the United States different rules have been adopted in the various states. In some, as for example, Massachusetts, the rule is very liberal.

Saltonstall v. Sanders, 11 Allen (Mass.), 446.
Weber v. Bryant, 161 Mass., 400.

In other states the rule is more strict.

Livesey v. Jones, 55 N. J. Eq., 204; affd., 56 Id., 453.

See:

5 Am. & Eng. Encyc. of Law, 2nd Ed., p. 933.

See also discussion of *cy pres* doctrine below.

Where the word "benevolent" has been used, it has sometimes been held equivalent to "charitable."

Murphy's Est., 184 Pa. St., 310.

Weber v. Bryant, *supra.*

Contra,

Morice v. The Bishop of Durham, *supra.*

Indefiniteness of Beneficiaries. The indefiniteness of the beneficiaries is a necessary element of all charitable trusts, and a trust in which the beneficiaries are ascertained or capable of being ascertained by the ordinary rules of judicial construction cannot be treated as charitable.

Russel v. Allen, 107 U. S., 163.

Kent v. Dunham, 142 Mass., 216.

Bullard v. Chandler, 149 Mass., at p. 540 (*semble*).

Coe v. Washington Mills, Id., 543.

The beneficiaries may be so indefinite, however, that in America the trust will not, in the absence of trustees, be enforced. This question will be more fully considered under the discussion of the *cy pres* doctrine.

The Cy Pres Doctrine. The *cy pres* power is a name applied to two very different functions exercised by the Chancellor, in respect to charitable trusts. One has been denominated judicial and the other prerogative, one is the act of a court of justice, the other an arbitrary exercise of royal authority. These powers can best be understood by observing the cases which call them into action. Of such cases there are four, divided into two classes, first, where the method of application is fully pointed out, but the property cannot be applied according to that method, and there is nothing to indicate that the creator of the trust

intended the method of application indicated, and no other; second, where the method of application is left wholly or partially unexpressed, and there are no trustees who are able and willing to execute the trust. Taking up the first class, if by reason of a change of circumstances or change of law since the trust was created, it becomes impossible to carry it out, according to the intent of the creator, the court, by the exercise of the judicial *cy pres* power, will direct the property to be applied in a manner as nearly as possible like that indicated. The following are instances:

Jackson v. Phillips, 14 Allen (Mass.), 539, 573.
Atty. Gen. v. Briggs, 164 Mass., 561.
Amory v. Atty. Gen., 179 Mass., 89.

Where, however, it appears that it is the intent of the creator of the trust that the particular plan indicated shall be followed and no other, if that method becomes impossible the trust must fail.

Teele v. Bishop of Derry, 168 Mass., 341.

The judicial *cy pres* power is exercised by referring the matter to a master in chancery or equivalent officer to devise a scheme for the application of the property, as nearly as possible—which is the meaning of the words *cy pres*—like that intended by the creator of the trust.

Where, however, the purpose of the trust is illegal by the general policy of the realm, under the English system the prerogative *cy pres* power may be exercised and the property be disposed of under the sign manual of the Crown for some other charitable purpose perhaps entirely different from that intended by the creator of the trust. Such cases are very rare. For instances see:

De Costa v. De Pas, Ambler, 228.
Cary v. Abbot, 7 Ves., 490.

In the United States the prerogative *cy pres* power exists in the people and may be exercised by the legislature.

Mormon Church v. U. S., 136 U. S., 1, 50.
S. C., 140 U. S., 665.
S. C., 150 U. S., 145.

It cannot in the absence of statute be exercised by any court, and therefore any trust for an illegal purpose must fail.

In the second class of cases above mentioned, if the method of application be indicated in a general way, but the details be left to be worked out in the course of administration, and there are no trustees, it is a case for the judicial *cy pres* power, and the matter may be referred to a master to devise a scheme. If, however, the gift is to charity generally no method of application being pointed out—or what is saying the same thing, the beneficiaries being so indefinite that they cannot be ascertained by any judicial action—it is then, in the absence of trustees, a case for the exercise of the royal prerogative.

Moggridge v. Thackwell, 7 Ves., 36.

As the prerogative *cy pres* power has not in general been conferred upon any court in the United States, such a trust must fail unless there are trustees or unless there is a statute providing for such cases.

For a general discussion of this subject see:

Reeves on Real Property, Secs. 346-349.

Jackson v. Phillips, 14 Allen (Mass.), at pp. 574-576.

The following are instances of trusts held sufficiently definite to be executed:

Moggridge v. Thackwell, *supra.*
Missionary Society v. Chapman, 128 Mass., 265.
Sears v. Chapman, 158 Mass., 400.
Darcy v. Kelly, 153 Mass., 433.
Dailey v. New Haven, 60 Conn., 314.

The following are instances of trusts held too indefinite:

Fontain v. Ravenel, 17 How. (U. S.), 369.
Livesey v. Jones, *supra.*

For the rules in the various states on the question of indefiniteness of beneficiaries and *cy pres* power, see:

5 Am. & Eng. Encyc. of Law, 2nd Ed., pp. 905-912 & 942, and cases cited.

Perpetuities. Charitable trusts are not in general within the rule against perpetuities.

Reeves on Real Property, Sec. 350.
Jones v. Habersham, 107 U. S., 174, 185.
Society v. Atty. Gen., 135 Mass., 285.

Charitable Trusts in New York. The history of charitable trusts in New York is peculiar. At first they were supported, but afterward it was decided that in repealing the Statute of 43 Elizabeth the legislature intended to abolish such trusts, and in answer to the argument that such trusts were enforced before the statute, the Court of Appeals said that at the time of such repeal it was supposed that charitable trusts had their origin in that statute, and that the subsequent discovery that they did not could not have a bearing upon the legislative intent. Accordingly charitable trusts were for a long period void in New York.

Holland v. Alcock, 108 N. Y., 312, 324.
Tilden v. Green, 130 N. Y., 29.

By Chapter 701 of the Laws of 1893, it was provided that where a trust was created for "religious, educational, charitable or benevolent uses," it should not be void because of uncertainty of beneficiaries, and directions were given as to the enforcement of such trusts.

Laws of 1893, Ch. 701, as amended by Laws of 1901, Ch. 291.
Real Property Law, Sec. 93.

See:

Birdseye's R. S., 3rd Ed., Vol. III., p. 3031.

Under this statute charitable trusts are now valid in New York, even where perpetuities are created.

Allen v. Stevens, 161 N. Y., 122.
Matter of Griffin, 167 N. Y., 71.
Rothschild v. Goldenberg, 103 App. Div., 235.

For a history of charitable trusts in New York see:

Reeves on Real Property, pp. 493-503.

D. Powers in Trust.

In General. Under the head of express trusts may properly be considered the subject of powers in trust. A power is an authority to dispose of an estate in real property which is not vested in the donee of the power. A power in trust, therefore, differs from a true trust only in the fact that the trustee does not have the legal estate. For a discussion of the subject of powers in trust, see:

1 Perry on Trusts, Secs. 248-258.

When Imperative. The most important question concerning powers in trust is whether a power is imperative or discretionary. If imperative its execution will be directed by a court of equity in case of the failure or refusal of the donee to execute it, but otherwise if it is discretionary.

A trust power is generally held to be imperative unless expressly made discretionary, even though granted in permissive words.

Harding v. Glyn, 1 Atk., 469; Ames' Cases on Trusts, 78 and note.

Brown v. Higgs, 8 Ves. 561; affd., 18 Id., 192.

N. Y. Real Property Law, Sec. 137; Birdseye's R. S. 3rd Ed., Vol. III., p. 3038.

Smith v. Floyd, 140 N. Y., 337.

Dominick v. Sayre, 5 N. Y. Supr., 555.

Where, however, a grantor reserves to himself a portion of the power of disposition which he already has, a power in trust will not be created.

Towler v. Towler, 142 N. Y., 371.

There is a possible distinction between powers of appointment and those which are purely administrative, such as powers of sale given to trustees who do not have the fee. It is possible that the latter might be considered discretionary more readily than the former.

Coleman v. Beach, 97 N. Y., 545, 557.

Miller v. Wright, 109 N. Y., 194-200.

Sites v. Eldridge, 45 N. J. Eq., 632.

Where, however, the exercise of an administrative

power, though created by permissive words, is necessary to carry out the terms of the instrument creating it, it will be deemed imperative.

Matter of Gantert, 136 N. Y., 106.

Venable v. Mercantile Trust & Dep. Co., 74 Md., 187, 191.

This much may be said, however, that a power of appointment is always imperative if it be considered a power in trust at all; for if there is no obligation to appoint, there is no trust. An administrative power, on the other hand, may be in trust and yet be purely discretionary.

Even where a power is discretionary, so that the trustee cannot be compelled to execute it, if he voluntarily attempts to do so, a court of equity will prevent its improper execution.

Tempest v. Lord Camoys, 21 Ch. D., 571, 578.

Validity of Purpose. A trust power cannot be created to accomplish any purpose for which a true trust would be invalid (except as permitted N. Y. Real Property Law, Sec. 79), and the same rules as to certainty of beneficiaries and perpetuities apply.

Tilden v. Green, 130 N. Y. 29, 52-55.

Murray v. Miller, 178 N. Y., 316, 323.

Genet v. Hunt, 113 N. Y., 158, 165-171.

Manner of Execution. In general where there is an imperative power of appointment among a designated class which the donee fails to execute, equity will decree an equal division, but if the discretion to be exercised in the selection of the beneficiaries from among the class depends upon facts which can be ascertained by a judicial inquiry, then the court may "look with the eyes of the trustee" and substitute its own judgment for his.

Glover v. Condell, 163 Ill., 566, 594.

New York Statute. Powers in New York, including powers in trust, are regulated by statute, which is in the main declaratory of the common law.

N. Y. Real Property Law, Secs. 110-162; Birdseye's R. S., 3rd Ed., Vol. III., pp. 3033-3041.

VII.

IMPLIED TRUSTS.

Implied trusts are generally passive in their nature. The only obligation of the trustee is in general to transfer title to the *cestui que trust,* or to some person nominated by him.

A. Resulting Trusts.

Resulting trusts are defined under the head of Classification *ante.* They are divided into four classes according to the circumstances out of which they arise, as follows:

(1) Where purchase money is paid by one and title taken in the name of another.

(2) Purchase with fiduciary funds.

(3) Voluntary conveyance.

(4) Where property is given in trust, and the trust is not declared, in whole or in part, or fails, or is illegal or void.

Bispham's Equity, Sec. 79.

1. Purchase Money Paid by One, Title Taken in Name of Another.

In General. This trust is implied by equity on the presumption that the party who pays the purchase money intends to become the beneficial owner. Such presumption is disputable and may be rebutted by proof of a contrary intent. For a discussion of the general doctrine see:

Dyer v. Dyer, 2 Cox., 92, 1 White & Tudor (14th Am. Ed.), 314.

Jackson v. Matsdorf, 11 Johns., 91.

The following case is an instance of a trust of this class:

Third National Bank v. Carey, 39 N. J. Eq., 25.

Where the consideration is paid by A and title taken in the name of A and B, a trust results in favor of A to the extent of the interest conveyed to B.

Ward v. Ward, 59 Conn., 188.

Part Payment of Purchase Money. Where the person seeking to establish a resulting trust has paid only a part of the purchase money, he must have paid a definite portion for an aliquot part of the property, and if he has not done so a resulting trust will not be declared.

Bailey v. Hemenway, 147 Mass., 326.
Dudley v. Dudley, 176 Mass., 34.
Devine v. Devine, 180 Ill., 447.
Olcott v. Bynum, 17 Wall., 44, 59-60.
Schierloh v. Schierloh, 148 N. Y., 103.
Leary v. Corvin, 181 N. Y., 222, 226-228.

Time of Payment. The payment must be made at the transfer of title—or possibly before and in contemplation thereof—and no trust will result from a subsequent payment.

Fessenden v. Taft, 65 N. H., 39.
Pain v. Farson, 179 Ill., 185.
Reed v. Reed, 135 Ill., 482.
Niver v. Crane, 98 N. Y., 40.

This is true although the payment is the result of a prior oral agreement that the party seeking to establish the trust shall pay an obligation given at the time of taking title, in which both parties join.

Jacksonville National Bank v. Beasley, 159 Ill., 120.

In general the time must be that of actual conveyance.

Goelz v. Goelz, 157 Ill., at p. 45.

How Payment Made. Payment need not be made in cash. It is sufficient if an obligation is given.

Bibb v. Hunter, 79 Ala., 351.

Loan by Grantee. Sometimes the payment is actually made by the party in whose name title is taken, but with the intent that such payment shall be considered a loan to the party seeking to establish the trust, title being taken in the name of the lender as security. If that fact

can be established equity will declare a resulting trust, and decree a conveyance on payment of the loan.

Boyd v. McLean, 1 Johns. Ch., 582.
Scott v. Beach, 172 Ill., 273.

Loan to Grantee. Where it can be shown that the payment was intended by the parties as a loan to the grantee, the presumption of a trust being intended is rebutted, and no trust will be raised.

Walsh v. McBride, 72 Md., 45, 57-60.

Advancement. Where the party paying the consideration stands in the relation of parent or husband to the party in whose name title is taken, equity will presume that an advancement was intended, and will not raise a trust. Such presumption may, however, be rebutted.

Dyer v. Dyer, *supra.*
Smithsonian Inst. v. Meech., 169 U. S., 398-411.
Dana v. Dana, 154 Mass., 491.
Hallenbeck v. Rogers, 57 N. J. Eq., 199, 220.

Where children pay purchase money of land taking title in the name of a parent, the presumption of an advancement, will not arise.

Champlin v. Champlin, 136 Ill., 309, 313.

New York Rule. Resulting trusts of the first class in real property have been abolished by statute in New York.

Real Property Law, Sec. 74; Birdseye's R. S., 3rd Ed., Vol. III., p. 3025.
Everett v. Everett, 48 N. Y., 218, 222.

If, however, the title be taken in the name of the grantee without the knowledge or consent of the person paying the consideration, the statute does not apply.

Reitz v. Reitz, 80 N. Y., 538.

So where it would work a fraud to allow the grantee to take advantage of the statute, the court will raise a trust.

Jeremiah v. Pitcher, 26 App. Div., 402, 406; affd., 163 N. Y., 574.
Church of St. Stanislaus v. Algemeine Verein, 31 App. Div., 133; affd., 164 N. Y., 606.

In such cases, however, the trust is a constructive trust, arising out of fraud, actual or presumptive, and the payment of the purchase money constitutes merely one of several circumstances tending to show fraud.

If the grantee execute the trust, so that the real property becomes transmuted into personalty, the statute no longer applies.

Robbins v. Robbins, 89 N. Y., 251.
Bork v. Martin, 132 N. Y., 280, 286.

The trust provided for creditors of the person paying the purchase money is not the old resulting trust, excepted from the operation of the statute for their benefit, but is an entirely new trust, in which they are the direct *cestuis que trusts* of the grantee. The person paying the purchase money has no interest whatever.

Garfield v. Hatmaker, 15 N. Y., 475.

Such a trust will not be raised for the benefit of a wife claiming an inchoate right of dower.

Phelps v. Phelps, 143 N. Y., 197, 201.

2. Purchase With Fiduciary Funds.

Where a person in possession of funds of another either as agent, trustee or in any other relation of a fiduciary character, invests such funds in real property, taking title in his own name, a trust will result in favor of the person beneficially entitled to the fund.

Day v. Roth, 18 N. Y., 448, 455.
Sholty v. Sholty, 140 Ill., 81.
Wolfe v. Citizens' Bank (Tenn.), 42 S. W. Rep., 39-42.

It is possible that if title were taken in the name of the fiduciary with the assent of the beneficial owner of the fund, the statute in New York might in some cases prevent a trust from arising, but not if so taken in violation of a trust.

Real Property Law, Sec. 74, Subd. 2.

3. Voluntary Conveyance.

Prior to the statute of uses if a feoffment was made without consideration and without a use being declared to the feoffee or any other person, the use resulted to the feoffor. This resulting use is now preserved, in name at least, in this third class of resulting trusts. For a discussion of this subject see:

1 Perry on Trusts, Secs. 161-165.

Such trusts are very rare as in almost all modern conveyances the use is declared, and where that is the case absence of consideration will not cause a trust to result to the grantor.

Lovett v. Taylor, 54 N. J. Eq., 311.
Gove v. Learoyd, 140 Mass., 524.

See also:

Fitzgerald v. Fitzgerald, 168 Mass., 488.
Kellogg v. Western El. Mfg. Co., 168 Ill., 240.

Absence of consideration in connection with other circumstances may be sufficient to raise a constructive trust, which will be considered below.

4. Where Property is Given in Trust, but No Trust Is Declared or if Declared Cannot Be Carried Out.

Where property is given to certain persons upon trust, and the trust is not declared at all, or is not declared sufficiently to be enforcible, or is declared only as to part of the property, or fails, or is illegal or otherwise void, a trust results to those persons, who but for the trust would have been entitled to the property.

1 Perry on Trusts, Secs. 150-160a.
Morice v. The Bishop of Durham, 10 Ves., 522; Ames' Cases on Trusts, 195-197, 200.
Wood v. Keyes, 8 Paige, Ch., 365.
Hopkins v. Grimshaw, 165 U. S., 342, 353-357.
Edson v. Bartow (Fairchild v. Edson), 154 N. Y., 199, at p. 222.

A question often arises whether heirs or residuary devisees or legatees and in England whether heirs or personal representatives are entitled to the property in such a case. For a discussion see:

1 Perry on Trusts, Sec. 160a, and notes.

B. Constructive Trusts.

Constructive trusts are defined under the head of "Classification", *ante*. They are divided into two classes, those which arise out of fraud and those which arise in the absence of fraud.

1. Constructive Trusts Arising Out of Fraud.

One of the chief functions of a court of equity is to relieve against fraud. If by means of fraud a person has obtained title to or an interest in property, equity will declare him a trustee of such title or interest for the benefit of the person defrauded, and decree a conveyance. Fraud is of two kinds, actual and presumptive. Constructive trusts arising out of fraud may, therefore, be divided into two classes, those arising out of actual fraud and those arising out of presumptive fraud.

a. Constructive Trusts Arising Out of Actual Fraud.

In General. To move a court of equity to raise a constructive trust out of actual fraud, it is necessary, according to a recent writer, to prove all the elements of fraud required to sustain an action of deceit at law, viz.: "that the defendant made a representation which in spirit and essence was false, and that he did so either by expressing an untruth (*expressio falsi*) or by suppressing the truth (*suppressio veri*), as by remaining silent when it was his duty to speak; that he made such representation with wrongful and fraudulent intent, which fact may be proved by showing that he knew or believed it to be false, or that he was aware that he did not know whether it was true or false, or that although he believed it to be true he had no reasonable ground for the belief and so his belief can not be said to be honest; that he made it with intent that it should be acted on, or with reasonable ground

to believe that it would be acted on; that it was acted on by the complainant, who under the circumstances was justified as a reasonable person in so acting; that the statement was material—a substantial moving cause of the complainant's conduct, and that it has caused pecuniary damage as a proximate result, or will do so unless the relief prayed for—the establishment of a constructive trust and the consequent disposition of the property—is granted by the court." (Reeves on Real Property, Sec. 376.)

Misrepresentation. The following are instances of constructive trusts arising out of actual fraud consisting of misrepresentation of a material fact:

Tyler v. Black, 13 How. (U. S.), 230.
Jones v. Van Doren, 130 U. S., 684, 691.
Bacon v. Bronson, 7 John. Ch., 194.
Winans v. Huyck (Iowa), 32 N. W. Rep., 422.

Fraudulent Promise. A promise made with intent not to perform it, may constitute actual fraud. A court of equity will not, under the guise of a constructive trust, enforce a mere oral promise, void by the statute of frauds, but equity will not permit the statute to be made a cloak for fraud, and if one person has obtained title to property of another, or in which another has an interest, "by means of an intentionally false and fraudulent verbal promise" to hold or dispose of it for a particular purpose, equity will not permit him to retain the property and repudiate the promise, but will declare him a trustee.

Ryan v. Dox, 34 N. Y., 307.
Medical College Laboratory v. N. Y. University, 178 N. Y., 153.
Ahrens v. Jones, 169 N. Y., 555.
Herschel v. Mamero, 120 Ill., 660.
Gregory v. Bowlsby, 88 N. W. Rep., 822.

But where there is a mere oral promise, without any previous interest on the part of the promisee in the subject, equity will not raise a constructive trust as a remedy for the breach of such promise.

Emerson v. Galloupe, 158 Mass., 146.
Levy v. Brush, 45 N. Y., 589.

Even where there was a previous interest in the property, but the plaintiff surrendered no right on the faith of the promise, it was held that there was no fraud.

Wheeler v. Reynolds, 66 N. Y., 227, 233.

Devise or Bequest Obtained or Prevented by Fraudulent Promise. In like manner where a person by means of such a promise obtains a devise or bequest to himself or prevents a devise or bequest to another, and thereby obtains title to property, equity will not allow him to retain the property beneficially, but will hold him as a constructive trustee.

O'Hara v. Dudley, 95 N. Y., 403.

Trustees of Amherst College v. Ritch, 151 N. Y., 282, 322-328.

Dowd v. Tucker, 41 Conn., 197.

Duress, Undue Influence and Mistake. While these do not, strictly speaking, involve the element of misrepresentation, they are so nearly related to actual fraud that constructive trusts arising out of them are usually classed with those arising out of actual fraud.

The following are instances of duress and undue influence:

Eadie v. Slimmon, 26 N. Y., 9.

Adams v. Irving Nat. Bank, 116 N. Y., 606.

Equity will also relieve against a mistake of fact, by declaring a constructive trust.

Widdicombe v. Childers, 124 U. S., 400.

Short v. Currier, 153 Mass., 182.

Equity will rarely relieve against a mistake of law, unless added to the fact of mistake there are other circumstances, as for example, that the parties do not deal on an equal footing, or there is a confidential relation, or some undue influence exercised. In such a case the mistake of law may more properly be said to constitute an element of presumptive fraud.

The following are instances:

Haviland v. Willets, 141 N. Y., 35, 50-51.

Clark v. Clark, 42 At. Rep., 98.

b. Constructive Trusts Arising Out of Presumptive Fraud.

Presumptive fraud may be of three kinds; (1) "fraud presumed from the intrinsic nature of the transaction"; (2) "fraud presumed from the relations of the parties to the transaction"; (3) "fraud presumed or declared to exist as affecting third parties."

Reeves Real Property, Sec. 379.

Chesterfield v. Janssen, 1 Atk., 301, 1 White & Tudor, *541 at *p. 585.

A[1]. Constructive Trusts Arising Out of Fraud Presumed from the Intrinsic Nature of the Transaction.

Inadequacy of Consideration. While inadequacy of consideration has been laid down by some judges and writers as a circumstance from which fraud might be presumed, it may be stated that at the present day it does not of itself furnish a sufficient basis for such presumption, except possibly in rare instances of great inequality.

Eyre v. Potter, 15 How. (U. S.), 42, 59.

Dunn v. Chambers, 4 Barb., 376.

1 Story's Equity, Secs. 244-246.

1 Perry on Trusts, Sec. 187.

But inadequacy of consideration coupled with other circumstances may be sufficient to make out a case of presumptive fraud.

Allore v. Jewell, 94 U. S., 506, 511.

Sale by Heir of Expectancy. The sale by an heir of an expectancy is presumptively fraudulent, and the burden is cast upon the transferee of showing its fairness. If he can do so, it will be supported, but not otherwise. Some American cases require also the assent of the ancestor.

In re Kuhns' Est., 163 Pa. St., 438.

McClure v. Raben, 125 Ind., 139.

S. C., 133 Ind., 507.

1 Perry on Trusts, Sec. 188.

Jenkins v. Pye, 12 Peters, at p. 256.

B[1]. Constructive Trusts Arising Out of Fraud Presumed from the Relations of the Parties.

Trusts of this character may be divided into two classes: (1) when a person in some fiduciary position deals with the subject of the trust, or in respect thereto, and (2) where two persons who, by reason of their relations or circumstances, stand on an unequal footing, deal with each other, and the stronger or the one in the more influential position or in whom confidence is reposed, obtains some undue advantage over the other.

a[1]. Fiduciary Dealing With or in Respect to Subject of Trust.

In General. Equity will not permit a person who occupies a fiduciary relation toward another to deal with or in respect to the subject of that relation. Such relation need not be the technical relation of trustee and *cestui que trust,* but the rule applies to all relations of a fiduciary character.

Fiduciary Acquiring Outstanding Interest. Accordingly if a fiduciary acquires from a third person, an interest in the property which forms the subject of the relation, equity will declare him a trustee of such interest at the instance of the beneficiary.

> Keech v. Sandford, 1 White & Tudor, *44.
> Mitchell v. Reed, 61 N. Y., 123.
> Trice v. Comstock, 121 Fed. Rep., 620.

Fiduciary Acquiring Subject of Relation. Likewise if the fiduciary obtains title to the trust property itself, as by purchasing the same directly or indirectly at public or private sale, or in any other manner, equity will at the option of the beneficiary, and without regard to the adequacy or inadequacy of the price paid, set aside the transaction, and declare a constructive trust.

> Gardner v. Ogden, 22 N. Y., 327.
> Case v. Carroll, 35 N. Y., 385.

People v. Open Board of Stock Brokers' Building Co., 92 N. Y., 98.

Carpenter v. Carpenter, 131 N. Y., 101.

But see:

Allen v. Gillette, 127 U. S., 589.

Herr v. Payson, 157 Ill., 244.

The property purchased need not be the direct subject of the fiduciary relation, if the transaction tend to reduce the property which is the subject.

Fulton v. Whitney, 66 N. Y., 548.

In cases where a trustee empowered to sell property has a beneficial interest in the same to protect, he may obtain leave of court to purchase the same.

Scholle v. Scholle, 101 N. Y., 167.

The purchase is not void, but merely voidable, and may be confirmed by the court, but a mere formal confirmation of the sale is not sufficient unless all the parties in interest are before the court.

Fulton v. Whitney, *supra.*

Corbin v. Baker, 167 N. Y., 128.

See also:

Boyer v. East, 161 N. Y., 580.

So the transaction may be confirmed by lapse of time.

Kahn v. Chapin, 152 N. Y., 305.

b[1]. Parties Dealing on Unequal Footing.

In General. Where two parties deal with each other on an unequal footing, from whatever cause, equity requires the stronger or one in the more influential position to observe the utmost good faith, and unless he does so any transfer of property which he may obtain from the other party will be set aside at the latter's instance. If the relationship is that of trustee and *cestui que trust,* guardian and ward, or attorney and client, any transaction between the parties is presumptively fraudulent, and will

be set aside, unless the trustee, guardian or attorney is able to show affirmatively that the transaction was perfectly fair, that the other party acted freely, with full knowledge of his rights, and without any constraint or undue influence, and perhaps, also, on independent advice. If, however, the relation is that of parent and child, husband and wife, or some other less close relation, additional facts must be shown in order to raise the presumption of fraud or undue influence, but the facts need not be such as would be necessary to prove actual fraud. They need be sufficient only to raise a suspicion, and the closer and more confidential the relationship, the weaker the proof which is necessary to raise the presumption of fraud. The confidential relationship and facts sufficient to raise a suspicion of fraud being shown, the burden will then be cast upon the stronger party, or the one in whom confidence is reposed, to show the entire fairness of the transaction, and the absence of any fraud or undue influence. The same rules apply where one of the parties is subject to mental weakness, drunkenness or great distress, or where for any other reason, the parties do not deal upon an equal footing.

Reeves on Real Property, Secs. 383-385.

Fraud Presumed From Relationship Alone. The following cases are instances where the relationship alone raises the presumption of fraud:

Trustee and *cestui que trust.*

Adams v. Cowen, 177 U. S., 471, 482.

Guardian and ward.

McParland v. Larkin, 155 Ill., 84-89.

Attorney and client.

Nesbit v. Lockman, 34 N. Y., 167.

Fraud Presumed From Relationship and Additional Circumstances. The following cases are instances where the relationship alone is insufficient, and additional circumstances must be shown:

Parent and child.

Wood v. Rabe, 96 N. Y., 414.
Goldsmith v. Goldsmith, 145 N. Y., 313.
Jeremiah v. Pitcher, 26 App. Div., 402; affd., 163 N. Y., 574.
Leary v. Corvin, 181 N. Y., 222, 228.

Husband and wife.

Larman v. Knight, 140 Ill., 232.
Lamb v. Lamb, 18 App. Div., 250.

Brothers or brother and sister.

Beadle v. Beadle, 40 Fed. R., 315, 318-321.
Odell v. Moss, 137 Cal., 542.

Other confidential relations.

Barnard v. Gantz, 140 N. Y., 249.
Ingersoll v. Weld, 103 App. Div., 554.

Mental weakness of one party.

Allore v. Jewell, 94 U. S., 506.
Odell v. Moss, *supra*.

Advantageous position by reason of superior knowledge or other circumstances.

Haviland v. Willets, 141 N. Y., 35.
Clark v. Clark, 42 At. Rep., 98.
Troxell v. Silverthorn, 45 N. J. Eq., 330.

No rule can be laid down as to what circumstances in addition to the confidential relation or other inequality of position must be shown in order to raise the presumption of fraud. Each case must be decided on its own facts. Absence or inadequacy of consideration is, however, usually an element.

C[1]. Constructive Trusts Arising Out of Fraud on Third Parties.

In General. If two parties so deal with each other that one of them acquires title to property which should in equity go to some third party, a court of equity will

interfere and declare the person so acquiring title a trustee for the benefit of the third person.

Fraud on Purchasers. Where one person purchases property of another for a valuable consideration, but does not obtain the legal title, and another person, before or after such purchase, obtains the legal title from the same grantor, or by his procurement, without consideration, he will be decreed to hold such legal title in trust for the purchaser for a valuable consideration. In America, however, a voluntary deed is only presumptively fraudulent, as against a subsequent purchaser for a valuable consideration without notice.

Reeves on Real Property, Sec. 399.
Cathcart v. Robinson, 5 Pet., 264, 279.
Moore v. Crawford, 130 U. S., 122, 128-130, 140-142.
N. Y. Real Property Law, Sec. 226.

Fraud on Creditors. Where a debtor transfers his property to prevent his creditors from collecting their debts, the transferee, if participating in the guilty intent, or if the transfer is voluntary, will in effect be decreed to hold as trustee for the creditors.

Reeves on Real Property, Sec. 400.
Angle v. Chicago, &c., R. R. Co., 151 U. S. 1.
Metcalf v. Moses, 161 N. Y., 587.

Fraud upon Marital Rights. The voluntary conveyance by one party on the eve of marriage and without consent of the other in order to prevent such other party from acquiring marital rights in the property conveyed, constitutes a fraud on such other party, and the transferee will be declared a trustee. For a discussion of this subject and instances, see:

Reeves on Real Property, Sec. 401.
Strathmore v. Bowes, 1 White & Tudor, *405.
Ferebee v. Pritchard, 112 N. C., 83.
Alkire v. Alkire, 134 Ind., 350.

Fraud on Powers. Where a power is conferred upon a person it must be fairly exercised for the purpose for

which it is given, and if exercised for another, or as it is called, a *sinister* purpose, the grantee will—unless a bona fide purchaser—be declared a trustee. The following are instances of the improper exercise of powers:

Alleyn v. Belchier, 1 White & Tudor, *377.
Duke of Portland v. Topham, 11 H. L. C., 32.

Power held properly executed.

Jackson v. Veeder, 11 Johns., 169.

See:

Reeves on Real Property, Sec. 402.

2. Constructive Trusts Arising Without Fraud.

In General. Of trusts of this class it may be said that where equity can promote the ends of justice by raising a trust, it will in general do so. Such trusts may arise out of many situations and relations in which parties may find themselves in dealing with each other.

Vendor and Purchaser. When a valid contract is entered into for the purchase and sale of real property, the vendor becomes a trustee of the legal title for the vendee and the vendee becomes a trustee of the purchase money for the vendor.

Sutphen v. Fowler, 9 Paige Ch., 280.
Williams v. Hadcock, 145 N. Y., 144, 150.

Contract Relations. So trusts may be raised out of various contractual relations.

Johnston v. Spicer, 107 N. Y., 185-196.

See also, cases cited under the head "Trust and Debt Distinguished" *ante*.

VIII.

"THE NATURE OF THE CESTUI QUE TRUST'S INTEREST."

A. "His Claim is Purely Equitable, Except When Account Would Lie At Common Law."

In General. Generally speaking the remedy of the *cestui que trust* for a breach of trust is by a suit in equity against his trustee to compel him to perform the trust, and a court of law will not take cognizance of the matter.

Norton v. Ray, 139 Mass., 230; Ames' Cases on Trusts, 239.
Marvin v. Brooks, 94 N. Y., 71.

Some cases have held that an action on the case would lie for damages for breach of trust.

Megod's Case, 4 Leon., 225; Ames' Cases on Trusts, 235, and notes.

Where Amount Liquidated. Where the trust property consists of a liquidated sum of money, and the only duty of the trustee is to presently pay it to the *cestui que trust,* an action at law to recover it will lie.

Johnson v. Johnson, 120 Mass., 465.
Derome v. Vose, 140 Mass., 575.

In such cases courts of law and equity have concurrent jurisdiction.

N. Y. Ins. Co. v. Roullet, 24 Wend., 505.

Where Action of Account Lies. The action of account seems to lie in cases of trusts recognized by common law and growing, for the most part, out of various business relations.

Anon., Y. B., 6 Hy. IV., fol. 7, pl. 33; Ames' Cases on Trusts, 1, and notes.
Paschall v. Keterich, Dyer, 151b, pl. 5; Id. 2, and notes.
Harris v. deBervoir, Cro. Jac., 687; Id., 4.

Farrington v. Lee, 2 Mod. Rep., 311; Id., 6, and notes.

See also:

Ames' Cases on Trusts, 240, Note 2.

Equitable Defense in Action at Law. In early times the common law courts would not recognize the rights of the *cestui que trust,* even in an action brought against him by the trustee for ejectment or trespass.

Anon., Y. B., 4 Edw. IV., fol. 7, pl. 9; Ames' Cases on Trusts, 240.

Weakly v. Rogers, 5 East, 138; Id., 241.

In such cases an action in equity will lie to restrain the enforcement of the judgment.

Johnson v. Christian, 128 U. S., 374, 381.

In many jurisdictions an equitable defense may, by statute, be interposed in an action at law.

Ames' Cases on Trusts, 242, Note 1.

7 Encyc. of Pleading and Practice, 800-805.

N. Y. Code of Civ. Pro., Sec. 507.

Cavalli v. Allen, 57 N. Y., 508-514.

Hoppough v. Struble, 60 N. Y., 430.

B. "Cestui Que Trust is a Claimant Against the Trustee—Not the Owner of the Trust-res."

1. "His Claim is Enforceable Regardless of the Situs of the Trust-res."

Land Without the Jurisdiction of Court. Where the land is without the jurisdiction of the court, the court will nevertheless, on obtaining jurisdiction of the person of the trustee, compel him to perform the trust.

Earl of Kildare v. Eustace, 1 Ves., 405, 419; Ames' Cases on Trusts, 244.

Sutphen v. Fowler, 9 Paige, 280.

Gardner v. Ogden, 22 N. Y., 327, 332-339.

Property Within Jurisdiction—Trustee Not. Equity acts *in personam* and not *in rem.* Accordingly if personal

jurisdiction of the trustee cannot be obtained, the court cannot afford relief, even though the property is within its jurisdiction, unless authorized by statute.

Hart v. Sansom, 110 U. S., 151.

Felch v. Hooper, 119 Mass., 52; Ames' Cases on Trusts, 246, and notes.

The statutory provisions in New York authorizing proceedings *in rem* in such cases are found in the Code of Civil Procedure, being those relating to service by publication and authorizing judgment thereon.

2. "Cestui Que Trust Cannot Proceed Directly Against a Stranger, Either at Law or in Equity"

In General. Where it is necessary to take some legal proceeding against a stranger for the recovery or protection of trust property, it must in general be brought by and on behalf of the trustee, and the *cestui que trust* cannot proceed directly against such third person.

Bailey v. N. E. Mutual Life Ins. Co., 114 Mass., 177; Ames' Cases on Trusts, 256.

Morgan v. Kansas Pac. Ry. Co., 15 Fed. Rep., 55; Id., 258.

Western R. R. Co. v. Nolan, 48 N. Y., 513-518.

Where Trustee Refuses. If, however, the trustee, after proper demand, refuses to bring an action the *cestui que trust* may proceed in equity, joining the trustee and stranger as defendants.

Harvey v. McDonnell, 113 N. Y., 526, 531.

Anderson v. Daley, 38 App. Div., 505.

Cestui Que Trust in Possession of Real Property. A *cestui que trust* in possession of real property may bring trespass against persons breaking the close.

Second Congregational Society v. Waring, 24 Pick. (Mass.), 304.

Cestui Que Trust Not Necessary Party to Trustee's Suit to Recover Trust Property. If the trustee brings an action to recover trust property so that he may apply it to the purposes of the trust, he need not make the *cestui*

que trust a party unless an administration of the trust by the court is prayed for.

Carey v. Brown, 92 U. S., 171; Ames' Cases on Trusts, 260, and note.

Roberts v. N. Y. El. R. R. Co., 155 N. Y., 31, 38.

See also:

Matter of Straut, 126 N. Y., 201.

Wetmore v. Porter, 92 N. Y., 76; Ames' Cases on Trusts, 262.

Suits against Trustee. In suits by a stranger against the trustee to defeat the trust, the *cestui que trust* is not a necessary party if the trustee's powers are such that he is authorized to represent and bind the beneficiary.

Kerrison v. Stewart, 93 U. S., 155.

Vetterlein v. Barnes, 124 U. S., 169.

But where any interest of the beneficiary as to which the trustee does not represent him, is affected, the beneficiary must be a party.

Northampton Nat. Bk. v. Crafts, 145 Mass., 444.

Brokaw v. Brokaw, 41 N. J. Eq., 215.

3. "A Cestui Que Trust of an Obligation Cannot Discharge the Obligor."

In General. Where the subject of the trust is an obligation, the trustee alone has power to discharge it and not the *cestui que trust.*

Parker v. Tennant, Jenkins, Century Cases, 221, pl. 75; Ames' Cases on Trusts, 266.

Anon., Dalison, 38, pl. 6; Id. 266.

Crosby v. Bowery Savings Bank, 50 N. Y. Supr., 453.

But see:

Ames' Cases on Trusts, 266, Note 2.

Galt v. Smith, 145 Pa. St., 167.

Payment to the trustee discharges the obligator.

Gibson v. Winter, 2 L. J., N. S., K. B., 130; Ames' Cases on Trusts, 267.

Application of Purchase Money. A person buying trust property is no longer obliged to see to the application of the purchase money.

Ames' Cases on Trusts, 269, Note.

But see:

28 Am. and Eng. Encyc. of Law, 2nd. Ed., 1125.

Set-Off. For the rules as to set off, see:

Ames' Cases on Trusts, 270, Note.

N. Y. Code of Civil Procedure, Sec. 502, Subd. 3.

4. "When Cestui Que Trust's Interest in the Trust-res is Forfeited by the Trustee's Laches."

If the trustee fail to take proper steps to protect or recover trust property, and his right to do so becomes lost by reason of the statute of limitations or otherwise, the *cestui que trust* cannot afterward take steps on his own account.

Wych v. East India Co., 3 P. Wms., 309; Ames' Cases on Trust, 271.

Meeks v. Olpherts, 100 U. S., 564.

Lloyd's Banking Co. v. Jones, 29 Ch. D., 221; Ames' Cases on Trusts, 272.

5. "Cestui Que Trust Cannot Vote as Owner of the Res."

Where the trust property consists of corporate stock, the trustee and not the *cestui que trust* is the proper person to vote at meetings of stockholders.

Matter of Barker, 6 Wend., 509; Ames' Cases on Trusts, 275.

6. "The Burdens Incident to Ownership Fall Upon the Trustee, and Not Upon the Cestui Que Trust."

The trustee is liable for taxes assessed on the trust estate, and personalty must be assessed where he resides and not where the *cestui que trust* resides.

Latrobe v. Baltimore, 19 Md., 13; Ames' Cases on Trusts, 278.

The trustee is liable personally and not in his representative capacity, for damages for injuries resulting from the defective condition of premises constituting trust property.

Keating v. Stevenson, 21 App. Div., 604.
Miniot v. Jackson, 40 Misc., 197.

The trustee is also in general personally liable upon a contract made by him for repairs on premises constituting trust property. In certain cases, however, he may pledge the trust estate.

O'Brien v. Jackson, 167 N. Y., 31.

New York Rule. In New York the interest taken by the *cestui que trust* of an express trust in lands is governed by statute.

Real Property Law, Sec. 80; Birdseye's R. S., 3d. Ed., Vol. III., p. 3027.

This was revised from 1 R. S., 729, Sec. 60, which provided that the trustee should have the whole estate "in law and in equity," and that the beneficiary should take no estate or interest. Whether the amendment has revived the idea that the beneficiary has an equitable estate is of little practical importance; his rights are substantially the same in either case.

This statute does not apply to implied trusts, and they are still governed by common law. Of such a trust and of passive trusts generally, wherever they now exist, it seems, perhaps, more reasonable to say that the *cestui que trust* is owner of an equitable estate, rather than a claimant against the trustee. In Cavalli v. Allen (57 N. Y., 508), Commissioner Dwight said. "He (a purchaser of real property after the execution of the contract) was owner of an equitable estate in fee," and added that he might, out of that carve "smaller derivative estates to sub-purchasers."

3 Pomeroy's Equity Jurisprudence, 3rd Ed., Sec. 988.

The distinction is, however, as stated above, one of little, if any, practical importance.

IX.

"THE TRANSFER OF TRUST PROPERTY."

A. "By Act of the Party."

1. "By Act of the Trustee."

General Doctrine. Where the trustee, in violation of the trust, transfers trust property to a third person, the *cestui que trust* can follow it and recover it from such third person, or any subsequent transferee, so long as he can identify it, unless it comes into the hands of a purchaser for value and without notice of the trust.

Am. Sugar Ref. Co. v. Fancher, 145 N. Y., 552, 556-557.

But if the legal title comes into the hands of a *bona fide* purchaser, the right of the *cestui que trust* is gone.

Valentine v. Lunt, 115 N. Y., 496.

Priorities Between Equities. Where two claimants of property stand on an equal footing so far as their equitable claims are concerned, equity will first look to see if either holds the legal title, and if so will award the property to him on the maxim, "Where the equities are equal the law will prevail." The equities between a *cestui que trust* and a *bona fide* purchaser of trust property are considered equal, and accordingly if such purchaser has acquired the legal title he will prevail.

Williams v. Jackson, 107 U. S., 478.
Dunlop v. Avery, 89 N. Y., 592.

If, however, the legal title is not found in either claimant, the maxim, "Where the equities are equal, he who is prior in time is superior in right," will apply. If, therefore, a *bona fide* purchaser of trust property from the trustee, acquire only an equitable interest, the *cestui que trust* will prevail.

Eyre v. Burmester, 10 H. L. C., 90; Ames' Cases on Trusts, 306.
Grimstone v. Carter, 3 Paige, 421.
Cave v. Mackensie, 46 L. J. Ch., 564; Ames' Cases on Trusts, 308.

A difficult question arises when the purchaser, having

acquired from the trustee an equitable interest for value and without notice, then receives notice and afterwards gets in the legal title. The rule seems to be that if he gets in the legal estate even after suit brought from one who can convey it to him without committing a breach of trust, it will avail him.

Bates v. Johnson, Johns., 304; Ames' Cases on Trusts, 292.

Dodds v. Hills, 2 H. & M., 424; Id., 297.

See also:

Leitch v. Wells, 48 N. Y., 585.

Where, however, the grantee of the legal estate commits a breach of trust in conveying it, the legal title will not protect the subsequent purchaser.

Saunders v. Dehew, 2 Vern., 271; Ames' Cases on Trusts, 289, and notes.

Grimstone v. Carter, *supra.*

Shropshire &c., Ry. Co. v. The Queen, L. R., 7 H. L., 496; Ames' Cases on Trusts, 300.

Where the equities are not equal he who has the better equity will prevail, as where the purchaser is a volunteer or takes with notice. Sometimes a priority is allowed between an equitable interest and an equity, such, for example, as a mere right to set aside a conveyance for fraud.

Cave v. Cave, 15 Ch. D., 639; Ames' Cases on Trusts, 311.

Notice. What constitutes sufficient notice to affect a purchaser of trust property is a question of fact in each case. It need not be actual notice, but it is sufficient if it puts him upon inquiry.

National Bank v. Insurance Co., 104 U. S., 54.

Union Stock Yards Bank v. Gillespie, 137 U. S., 411.

Kirsch v. Tozier, 143 N. Y., 390.

Where the trust affects personal property, the pendency of a suit in equity—no complaint having been filed—is not notice.

Leitch v. Wells, 48 N. Y., 585, 601.

Possession is usually notice.

Grimstone v. Carter, 3 Paige, 421.
Seymour v. McKinstry, 106 N. Y., 230.

But see:

Cornell v. Maltby, 165 N. Y., 557.

Notice to an agent is usually notice to his principal, but may not be where the agent is acting in his own interest.

Benedict v. Arnoux, 154 N. Y., 715, 718.

Where the property passes into the hands of a *bona fide* purchaser, he can give a good title to one affected with notice, but not if that person is a former holder of the legal title charged with notice.

Clark v. McNeal, 114 N. Y., 287.

Consideration. The only question which need be discussed under this head is whether an antecedent debt constitutes sufficient consideration. Different rules prevail in different jurisdictions.

23 Am. & Eng. Encyc. of Law, 2nd Ed., 490, *et seq.*
Bay v. Coddington, 5 Johns. Ch., 54.
Coddington v. Bay, 20 Johns., 637.
Goodwin v. Mass. Loan, &c. Co., 152 Mass., 189, 198-200.
Gest v. Packwood, 34 Fed. Rep., 368.

Identification of Property. Where the trustee in violation of the trust transfers property to another, the beneficiary must be able to identify it in order to follow it. It may have been entirely changed in its character and mingled with other property, but if he can trace it into any fund, investment, or specific property of any description, he will be entitled to the whole of such property (if it consists entirely of the proceeds of the trust property), or to a lien thereon on the extent of his interest.

Green v. Given, 33 N. Y., 343, 358-367.
Holmes v. Gilman, 138 N. Y., 369.
National Bank v. Insurance Co., *supra.*
Union Stock Yards Bank v. Gillespie, *supra.*

Where the trustee has mingled the trust property with other property of his own, and become insolvent, three different rules have been adopted on the question to what extent the *cestui que trust* must identify the property in order to obtain preferential payment. Some cases hold that it is sufficient merely to show that the property came into the hands of the trustee, and that then it will be presumed to constitute part of any estate which may be left on the theory that the estate has been increased by so much.

Peak v. Ellicott, 30 Kan., 156.

People v. City Bank of Rochester, 96 N. Y., 32.

Other cases hold that the *cestui que trust* must show not only that the trust property has come into the hands of the trustee, but that it still remains as part of his general estate, and if that can be done the former can have a lien on the general estate for the amount of the trust fund.

Continental National Bank v. Weems, 69 Tex., 489.

Arnot v. Bingham, 55 Hun, 553.

Still other cases, and these are by far the most numerous and authoritative, hold that some particular fund, investment or property must be pointed out, as being composed in whole or in part of trust property, or the proceeds thereof.

Cavin v. Gleason, 105 N. Y., 256.

Matter of Hicks, 170 N. Y., 195.

Little v. Chadwick, 151 Mass., 109.

Freiberg v. Stoddard, 161 Pa. St., 259.

Phil. Nat. Bank v. Dowd, 2 L. R. Ann., 480.

Nonotuck Silk Co. v. Flanders, 87 Wis., 237.

2. "By Act of the Cestui Que Trust."

Priority of Equities. Where a *cestui que trust* assigns his interest in the trust property to two or more successive *bona fide* purchasers, the one who receives the first assignment will in general have the better right on the maxim, "Where the equities are equal, he who is prior in time is superior in right," for neither has the legal title.

Phillips v. Phillips, 4 DeG., F. & J., 208; Ames' Cases on Trusts, 331.

If, however, notice of the first assignment is not given to the trustee, and the second assignee before purchasing, makes inquiry of the trustee, and then gives notice before the first assignee, some cases have held that he will prevail, and the same rule applies even if he fails to make inquiry.

Dearle v. Hall, 3 Russ., 48; Ames' Cases on Trusts, 323, and notes.

Parks v. Innes, 33 Barb., 37.*

See also:

Bridge v. Conn. Mutual Life Ins. Co., 152 Mass., 343.

Where the subsequent *bona fide* purchaser from the *cestui que trust* holds the legal title, as where he is the trustee, he will have the better right, on the maxim, "Where the equities are equal, the law will prevail."

Newman v. Newman, 28 Ch. D., 674; Ames' Cases on Trusts, 335.

Notice. The rules as to notice are the same as in case of transfer by the trustee. A question arises under recording acts, however, in cases where the interest of the *cestui que trust* does not appear of record. In such cases if he convey his interest, and the conveyance is recorded, it does not constitute constructive notice to a subsequent *bona fide* purchaser of the legal title from the trustee, although it would be notice to any subsequent purchaser of the equitable interest from the *cestui que trust.*

Tarbell v. West, 86 N. Y., 280-289.

B. "By Death."

1. "Death of the Trustee."

At Common Law. Trustees are usually joint tenants and survivorship obtains among them.

1 Perry on Trusts, Sec. 343.

Peter v. Beverly, 10 Pet., 532, 562.

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*In New York between successive assignees of a chose in action, the first assignee has the superior right. whichever one first notifies the debtor. Greentree vs. Rosenstock, 61 N. Y., 583, 593; Williams vs. Ingersoll, 89 N. Y,, 508, 523; Fairbanks vs, Sargent; 104 N. Y,, 108, 118.

At common law on the decease of a sole trustee, if the trust still continues, the property will devolve upon his heir or personal representative, according as it is real or personal property, charged with the trust.

1 Perry on Trusts, *supra.*

Lawrence v. Lawrence, 181 Ill., 248-252.

DePeyster v. Ferrers, 11 Paige, 13.

If the trustee has no heirs or next of kin, the property will go to the sovereign, but the rights of the *cestui que trust* are recognized, either by statute or otherwise.

1 Perry on Trusts, Sec. 325.

N. Y. Public Lands Law, Laws of 1894, Ch. 317, Sec. 68, Birdseye's R. S., 3rd Ed., Vol. II., p. 2883.

1 Am. Statute Law, Sec. 1152.

Statutory Regulations. In New York on the decease of a sole trustee, the trust devolves upon the Supreme Court, which will appoint a new trustee, or take upon itself the execution of the trust.

Real Property Law, Sec. 91, as amended by Laws of 1902, Ch. 151.

Personal Property Law, Sec. 8, as amended by Laws of 1902, Ch. 150.

Matter of Waring, 99 N. Y., 114.

Matter of Mayne, 98 App. Div., 171.

For the rules in other states see:

1 Perry on Trusts, Sec. 341.

2. "Death of Cestui Que Trust."

In General. On the decease intestate of a *cestui que trust* having an estate of inheritance, the trust property will go to his heirs or personal representatives according as it is real or personal property.

Escheat. If the subject of the trust is real property and the *cestui que trust* leaves no heirs, it has been held in England that there is no escheat, and that the property belongs to the trustee discharged of the trust. This is upon the ground that the reason for escheat is that the lord has no

tenant to whom to look to perform the feudal duties, and that where the legal title is in a trustee, he can look to the trustee.

Burgess v. Wheate, 1 Wm. Blackstone, 123; Ames' Cases on Trusts, 356.
Gallard v. Hawkins, 27 Ch. D., 298.

In America the state takes the property, though it may not be called an escheat.

Johnston v. Spicer, 107 N. Y., 185, 196.

See:

11 Am. & Eng. Encyc. of Law, 2nd Ed., 323.

In case of personal property, if the *cestui que trust* leaves no one entitled to take, the property will go to the sovereign in both England and America.

Middleton v. Spicer, 1 Bro. Ch. Cas., 201; Ames' Cases on Trusts, 364.
Johnston v. Spicer, *supra.*

C. "By Disseisin."

If the trustee is disseissed the *cestui que trust* has no remedy against the disseissor, but may require the trustee to regain possession. This rule has come down from a similar rule applied to uses, the original reason of which was that the jurisdiction of Chancery to enforce a use was based upon confidence in the person of the feoffee to uses, and hence the use could be enforced only against the original feoffee or some one in privity with him.

Ames' Cases on Trusts, 370-373.

D. "By Marriage."

1. "By Marriage of the Trustee."

At the present day if a trustee marries, the other party to the marriage acquires no beneficial interest in the trust property.

Ames' Cases on Trusts, 374.
Cooper v. Whitney, 3 Hill, 95, 101.
King v. Bushnell, 121 Ill., 656.

2. "Marriage of Cestui Que Trust."

Dower. At common law the wife of a *cestui que trust* of an estate of inheritance in real property was not entitled to dower in the trust estate, but in most jurisdictions dower has been made an incident of equitable estates of inheritance by statute.

> Bottomley v. Lord Fairfax, Pr. in Ch. 336; Ames' Cases on Trusts, 375, and note.
> D'Arcy v. Blake, 2 Sch. & Lef., 387; Id. 376.
> 10 Am. & Eng. Encyc. of Law, 2nd Ed., 162.
> *In re* Ransom, 17 Fed. Rep., 331-334.

Curtesy. A husband, after issue born, is entitled to curtesy in an equitable estate of inheritance of his wife in real property, even where it is for her sole and separate use.

> Appleton v. Rowley, L. R., 8 Eq., 139; Ames' Cases on Trusts, 381.
> Cushing v. Blake, 30 N. J. Eq., 689.
> 8 Am. & Eng. Encyc. of Law, 2nd Ed., 520.

In cases of separate use, the wife can, however, bar curtesy by a conveyance or devise of the estate.

> Cooper v. Mac Donald, 7 Ch. D., 288.
> Chapman v. Price, 83 Va., 392.

Authorities are divided as to whether the husband can be excluded from curtesy by the terms of the instrument of settlement.

> 8 Am. & Eng. Encyc. of Law, 2nd Ed., 522.
> Ames' Cases on Trusts, 383, Note 3.
> Shalters v. Ladd, 141 Pa. St., 349,359.

Rights of Husband in Personal Property. The rights of the husband of a *cestui que trust* in personal property which constitutes the subject of the trust, are in general the same as his rights in property to which she has the legal title, except where the trust is for her sole and separate use.

> Miller v. Bingham, 1 Ired. Eq., 423; Ames' Cases on Trusts, 389, and notes.

E. Rights of Creditors.

1. Creditors of the Trustee.

Individual Debts. It may be stated that the trust estate is never liable for the individual debts of the trustee.

> Stith v. Lookabill, 71 N. C., 25; Ames' Cases on Trusts, 406.

The only possibility of trust property being applied to such debts is where the trustee has so mingled it with his own property that it can no longer be distinguished, which subject has been already considered under the head, "The Transfer of Trust Property—By Act of the Trustee."

Debts Incurred by Trustee for Benefit of Trust Estate. It is a general rule that where the trustee incurs debts for the benefit of the trust estate, he alone is liable and the creditor has no claim on the trust property, even though the debt is a proper one, which the trustee had authority to contract, and for which on payment he might be reimbursed out of the estate.

> Worrall v. Harford, 8 Ves., 4; Ames' Cases on Trusts, 415.
>
> O'Brien v. Jackson, 167 N. Y., 31.

Where, however, the trustee has incurred such a debt and the trust estate has had the benefit of the consideration thereof, and the trustee has become insolvent or left the jurisdiction, relief may then be had in equity against the trust estate, the *cestui que trust* being a necessary party.

> Willis v. Sharp, 113 N. Y., 586.
>
> Norton v. Phelps, 54 Miss., 467; Ames' Cases on Trusts, 420.
>
> O'Brien v. Jackson, *supra* (*semble*).

In such case the creditor is deemed subrogated, as it were, to the right of the trustee to be reimbursed out of the estate.

> Fairland v. Percy, L. R., 3 P. & D., 217; Ames' Cases on Trusts, 423.

Hence, if the trustee happens to be indebted to the estate for property unaccounted for, the creditor can have no bet-

ter claim to have his debt paid out of the estate than the trustee would to be reimbursed.

In re Johnson, 15 Ch. D., 548; Ames' Cases on Trusts, 426.

If the creator of the trust directs the trustee to carry on a business, only so much of the property becomes answerable for the debts incurred by the trustee in carrying on such business as the creator of the trust has expressly set apart for the purpose of carrying it on, and then only in case of the insolvency of the trustee.

Stewart v. Robinson, 115 N. Y., 328.
Fairland v. Percy, *supra.*
Willis v. Sharp, *supra.*

When a trustee is authorized to make an expenditure for the protection of the estate, but there are no funds in his hands, he may procure some outsider to advance the amount necessary and charge the estate.

O'Brien v. Jackson, *supra* (*semble*).

2. Creditors of Cestui Que Trust.

In General. In the absence of statute, the interest of a *cestui que trust* in the trust estate is in general subject to the claims of his creditors.

Spendthrift Trusts. It is sometimes attempted to create a trust so that creditors of the *cestui que trust* shall not be able to reach his interest in the estate, as by providing that the trustees shall pay the income from time to time to the *cestui que trust* only or only on his receipt, and not by way of anticipation. Such trusts are generally held illegal.

Brandon v. Robinson, 18 Ves., 429; Ames' Cases on Trusts, 394.

But in some jurisdictions they are permitted.

Broadway National Bank v. Adams, 133 Mass., 170; Ames' Cases on Trusts, 397.

Even in jurisdictions where spendthrift trusts are not

lawful, a limitation over may be made in case of the *cestui que trust* becoming bankrupt or ceasing to be entitled to the income.

Bramhall v. Ferris, 14 N. Y., 41-45.

And it may even be provided that after such an event the trustees may in their discretion apply the whole or some portion of the income to the support of the *cestui que trust*, and thus preserve it from his creditors.

In re Bullock, 60 L. J. R., Ch., 341; Ames' Cases on Trusts, 401.

New York Rule. In New York by statute the beneficiary of a trust under Subdivision 3, of Section 76, of the Real Property Law, cannot alienate his interest, nor can it be reached by his creditors, unless there is a surplus over and above what is necessary for his support, and the support of those dependent on him.

Real Property Law, Secs. 78 & 83; the latter as amended by Laws of 1903, Ch. 88.

Creditors who have exhausted their remedy at law may bring an action in equity against the trustee and *cestui que trust* to subject any surplus to the payment of their claims. In such an action not only will any surplus already accrued be applied, but the court will fix an amount necessary for the support of the *cestui que trust* and those dependent upon him, and direct that any future income in excess of such amount be applied on the debts.

Williams v. Thorn, 70 N. Y., 270.
Tolles v. Wood, 16 Abb. N. C., 1, and notes.

A wife may resort to a trust fund for payment of alimony.

Wetmore v. Wetmore, 149 N. Y., 520.

If the debtor be himself the creator of a trust for his own benefit, the statute does not apply, and the trust property will be subject to the claims of his creditors.

Schenck v. Barnes, 156 N. Y., 316.

X.

"THE DUTIES OF A TRUSTEE."

The most important duty of a trustee is fidelity to the trust reposed in him, to administer it in accordance with the provisions of the instrument creating it and solely for the benefit of the *cestui que trust*. He can obtain no advantage for himself, and if he does so equity will declare him a trustee of whatever he has gained, as was seen in the discussion of constructive trusts. Some particular duties will now be considered.

A. "To Convey the Trust-res as the Cestui Que Trust Directs."

In General. If all the beneficiaries desire to terminate the trust, and have the property conveyed to them, or sold, the question arises whether they are entitled to call upon the trustee to make a conveyance—assuming all persons interested to be of full age and capable of consenting. The English doctrine is that they are, even though such an arrangement is contrary to the directions of the instrument creating the trust.

Watts v. Turner, 1 R. & M., 634; Ames' Cases on Trusts, 453.
Saunders v. Vautier, 4 Beav., 115; Id. 454.

Such also appears to be the general rule in the United States.

Sears v. Choate, 146 Mass., 395.
Huber v. Donoghue, 49 N. J. Eq., 125.
Ames' Cases on Trusts, 453, Note 1.

But some cases have held that the express directions of the instrument of trust are not to be disregarded, and where these require a continuance of the trust, it will not be terminated, even at the request of all the beneficiaries.

Claflin v. Claflin, 149 Mass., 19; Ames' Cases on Trusts, 455.

See:

28 Am. & Eng. Encyc. of Law, 2nd Ed., 953.

In case of a trust merely passive no doubt can exist as to the right of a *cestui que trust* to demand a conveyance.

New York Rule. The policy of the law in New York is that the trustee shall retain the property and administer the trust until it terminates according to the terms of the instrument creating it. Hence in cases of express trusts no conveyance can be compelled.

Lent v. Howard, 89 N. Y., 169, 180.
Cuthbert v. Chauvet, 136 N. Y., 326.
Real Property Law, Sec. 85; Birdseye's R. S., 3rd Ed., Vol. III., p. 3028.

There formerly existed statutory provisions, whereby if the life beneficiary was entitled to the estate in remainder he could release his interest in the rents and profits and terminate the trust.

Real Property Law, Sec. 83; Id., 3027.
Personal Property Law, Sec. 3; Id., Vol. II., 2632.

For the construction of these provisions see:

Matter of U. S. Trust Co., 175 N. Y., 304.
Metcalf v. Union Trust Co., 181 N. Y., 39.

These sections have been amended so as to exclude this provision.

Laws of 1903, Chs. 87 & 88.

B. "The Duty to Put Cestui Que Trust in Possession of the Trust-res."

If the trust is passive the *cestui que trust* is entitled to possession. If active his right to possession will depend in general on the terms of the trust, and if these require the trustee to hold possession, the *cestui que trust* cannot demand it.

Tidd v. Lister, 5 Mad., 429; Ames' Cases on Trusts, 465.
In re Wythes, 1893, 2 Ch., 369, 374.
28 Am. & Eng. Encyc. of Law, 2nd Ed., 1106.

In New York the *cestui que trust* of an express trust cannot require possession of the trust property.

Mullins v. Mullins, 29 N. Y. Supp., 961.

C. "To Give Information."

The trustee is bound to give the *cestui que trust* information on matters relating to the trust estate.

In re Tillott, L. R. (1892), 1 Ch., 86; Ames' Cases on Trusts, 468, and notes.

D. "The Duty as to Investment of Trust Funds."

In General. Trustees must use with respect to trust funds, "such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters employ in their own like affairs. This necessarily excludes * * * everything that does not take into view the nature and object of the trust."

King v. Talbot, 40 N. Y., 76; Ames' Cases on Trusts, 472.

Not to Deal With Himself. The trustee must not invest trust funds in the purchase of property or securities of his own.

Matter of L. I. Loan and Trust Co., 92 App. Div., 1.

Character of Securities: General Rule. In the absence of statute, it is a general rule that trust funds should be invested in government securities or first mortgages on real property, but this rule is by no means inflexible.

King v. Talbot, *supra.*

Real Estate Securities. First mortgages on real estate with a sufficient margin of valuation are a proper form of investment. The mortgaged premises should generally be in the jurisdiction where the trust is being administered —that is where the trustee is required to account.

McCullough v. McCullough, 44 N. J. Eq., 313, 316.

Circumstances may, however, exist which justify an investment in mortgages on foreign real estate.

Ormiston v. Olcott, 84 N. Y., 339.

Second mortgages on real estate are not, in general, proper.

Whitney v. Martine, 88 N. Y., 535.
King v. Mackellar, 109 N. Y., 215.

This rule is not inflexible, however.

Higgins v. Whitson, 20 Barb., 141.

Trustees should not, except under unusual circumstances, invest trust funds in the purchase of real estate.

Baker v. Disbrow 3 Redf., 348; affd., 18 Hun, 29; affd., 79 N. Y., 631.

Personal Securities. Personal securities do not as a rule form a proper investment for trust funds.

Barney v. Saunders, 16 How. (U. S.), 535, 545.
In re Craven, 43 N. J. Eq., 416.

Stock. The trustee should not invest trust funds in such manner that they will be at the risk of a business or beyond his control. Hence corporate stocks have been held to be an improper investment.

King v. Talbot, *supra.*

But see:

In re Dickinson, 152 Mass., 184; Ames' Cases on Trusts, 478.

Bank Deposits. A trustee may temporarily deposit trust funds in a responsible bank or banking house, and if he uses due care and does not make the deposit in his own name he will not be liable in case of the failure of the bank.

Estate of Law, 144 Pa. St., 499.

But a distinction exists between principal and income, and it may be proper to leave the latter on deposit, when it would not the former.

Barney v. Saunders, 16 How. (U. S.), 535, 544-546.

But if he makes the deposit in his own name he will be liable in any event.

In re Arguello, 97 Cal., 196; Ames' Cases on Trusts, 482.

Business and Speculation. A trustee must not use trust funds nor invest them to be used in business or speculation.

Matter of Myers, 131 N. Y., 409.
Wilmerding v. McKesson, 103 N. Y., 329.
English v. McIntyre, 29 App. Div., 446.

Securities in Which Trustee Finds Fund Invested. If the trustee on assuming the trust find the fund invested in an improper manner it is his duty, as soon as he reasonably can, to change the investments to proper ones.

Matter of Myers, 131 N. Y., 409, 416.
Hunt v. Gontrum, 30 At. Rep., 620.

Investments Specified by Creator of Trust. A person creating a trust may direct the trustee to invest the estate in any manner, even in a personal loan, for use in the borrower's business without security.

Denike v. Harris, 84 N. Y., 89.

So he may direct the fund to be used in carrying on a business.

Willis v. Sharp, 113 N. Y., 586.

And he may direct him to leave the fund invested as he finds it, although invested in securities not proper for a trustee to invest in.

Brown v. Gellatly, L. R., 2 Ch. App., 751; Ames' Cases on Trusts, 489.

Investments in New York. The investments which trustees may make in New York are now prescribed by statute.

Laws of 1902, Ch. 295.

Failure to Invest. If the trustee fails to invest the fund when he has opportunity to do so, he will be liable for

the loss incurred or, if that cannot be ascertained, for interest.

Robinson v. Robinson, 1 DeG., M., & G., 247; Ames' Cases on Trusts, 495.

Gains From Improper Investments. If the trustee invests or employs the funds in an improper way, as in speculation in stocks, or in carrying on business, or otherwise, and thereby makes a profit, he cannot hold such profit for himself, but the beneficiary may elect whether to take the profit or charge the trustee with legal interest.

Barney v. Saunders, 16 How. (U. S.), 535, 543.
Baker v. Disbrow, 18 Hun, 29; affd., 79 N. Y., 631.

Rate of Interest. If a trustee becomes liable for interest a question arises as to the rate, and whether or not it shall be compounded. No uniform rule can be laid down. It will depend largely on the circumstances of the case, and the degree of fault on the part of the trustee. For illustrations, see:

Barney v. Saunders, 16 How. (U. S.), 535, 542.
Wilmerding v. McKesson, 103 N. Y., 329, 341.
Matter of Myers, 131 N. Y., 409.

See:

Ames' Cases on Trusts, 496, Note 8.
Robinson v. Robinson, *supra.*

Depreciation of Securities. If the trustee uses due diligence and proper care in making investments, he will not be liable for depreciation of the securities in which he has lawfully invested.

E. Duty Not to Mingle Trust Property With Other Property.

It is the trustee's duty to keep the trust property separate and apart from other property, and especially not to mingle it with property of his own.

1 Perry on Trusts, Sec. 463.
McCullough v. McCullough, 44 N. J. Eq., 313.
Case v. Abeel, 1 Paige, 393, 402.

F. "The Duty of Custody of the Trust-res."

The trustee is charged with the care of the trust-res, and it is his duty to see that it is protected. He is not required, however, to keep it in his manual custody, but may deposit it in a proper place. He must keep it as a prudent man would keep his own property.

Jones v. Lewis, 2 Ves., 240; Ames' Cases on Trusts, 502.

McCabe v. Fowler, 84 N. Y., 314.

Ex parte Ogle, L. R., 8 Ch. App. 711; Ames' Cases on Trusts, 504.

G. "The Duty Not to Delegate the Trust to Another."

In General. The trustee, if he accept the trust must perform it, and cannot in general delegate it to any one else.

1 Perry on Trusts, Sec. 402.

If Trustee Assigns to Another. If the trustee assigns the trust property to another, the assignee cannot perform the trust, and the same rule applies in general, in case of a devise.

Cooke v. Crawford, 13 Sim., 91; Ames' Cases on Trusts, 509, and notes.

Surviving Trustee. A surviving trustee may execute a trust, without having a new trustee appointed to take the place of one deceased, unless the instrument of trust provides otherwise, but a naked power will not survive.

1 Perry on Trusts, Sec. 414.

Lane v. Debenham, 11 Hare, 188; Ames' Cases on Trusts, 513.

Incapacity or Refusal to Act of One Trustee. In case of the incapacity of one or two or more trustees, or his refusal to act, a new trustee must be appointed or the court must take charge of the property, and each act requires the concurrence of all, except in case of public trusts, where a majority controls.

1 Perry on Trusts, Secs. 411-413.

Matter of Wadsworth, 2 Barb. Ch., 381; Ames' Cases on Trusts, 511.

Swale v. Swale, 22 Beav., 584; Id., 512, and notes.

Brennan v. Wilson, 71 N. Y., 502.

Trustee Must Exercise Powers. The trustee must exercise his powers himself, and not commit them to others.

Merrill v. Farmers' Loan and Trust Co., 24 Hun, 297.

Graham v. King, 50 Mo., 22; Ames' Cases on Trusts, 515.

Employment of Agents. A trustee may employ agents where it is necessary or reasonable to do so, but such agents must be proper persons—such persons as a prudent man would select in the conduct of his own affairs of like nature.

1 Perry on Trusts, 404.

Ex parte Belchier, Ambl., 218; Ames' Cases on Trusts, 516.

Speight v. Gaunt, 22 Ch. D., 727; Id., 518, and notes.

A trustee for the sale of property may, however, with full knowledge of the facts ratify and make binding a contract obtained by an agent.

Newton v. Bronson, 13 N. Y., 587, 593.

Responsibility for Acts of Co-Trustees. A trustee is responsible for his own acts, and not for those of his co-trustees. Accordingly, if one of several trustees, without affirmative action on the part of the others, receives and misapplies trust funds, the others will not be liable. But if trustees unnecessarily turn over the trust funds to one of their number, and he misapplies them, the others will be liable.

Peter v. Beverly, 10 Pet., 532, 561.

Bruen v. Gillet, 115 N. Y., 10.

Purdy v. Lynch, 145 N. Y., 462.